



NSW LAW REFORM COMMISSION

## REPORT 118

### Role of juries in sentencing

August 2007

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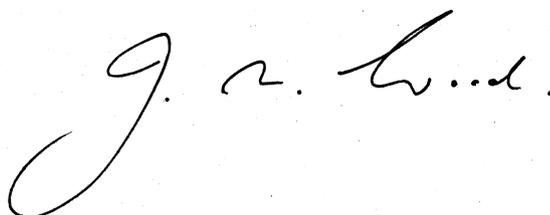
## Letter to the Attorney General

To the Hon John Hatzistergos  
Attorney General for New South Wales

Dear Attorney

### **Role of juries in sentencing**

We make this Report pursuant to the reference to this Commission received 25 February 2005.

A handwritten signature in black ink, appearing to read 'J. Wood', is centered on the page. The signature is written in a cursive style with a large initial 'J'.

The Hon James Wood AO QC  
Chairperson

August 2007

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**TERMS OF REFERENCE**


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In a letter to the Commission received on 25 February 2005, the Attorney General, the Hon R J Debus MP asked:

That the NSW Law Reform Commission inquire into and report on whether or not a judge in a criminal trial might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing.

In conducting this inquiry the Commission should have regard to:

1. the jury decision making process, including the jury's role in determining guilt or innocence of the accused, and the secrecy and protection of jury deliberations;
2. the judicial sentencing process, and the enhancement of public confidence in the administration of justice.

The Commission may also report on any related matters that arise in the context of its inquiry.

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**PARTICIPANTS**


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*The Hon Greg James QC*

*Professor Michael Tilbury*

The Hon James Wood AO QC (Commissioner-in-charge)

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LIST OF RECOMMENDATIONS

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**Chapter 4**

**Recommendation 1 – see page 56**

The Commission recommends that jurors should not be involved in the sentencing process to any greater extent than they are at present.

**Chapter 5**

**Recommendation 2 – see page 67**

The Commission recommends that further empirical studies should be done in NSW on public perceptions of the sentencing process.

**Recommendation 3 – see page 67**

The Commission recommends that the issue of public confidence in sentencing decisions should be addressed by increasing public education about sentencing laws and practice, including the factors and options that a judge must consider when determining the type and length of a sentence. Public education could be facilitated through:

- campaigns developed under the newly expanded functions of the Sentencing Council;
- greater use by the courts of plain English summaries of the reasons for sentencing decisions;
- the production and widespread distribution of easy to understand information concerning sentencing available in various formats; and
- improved cooperation between the media and criminal justice officials responsible for disseminating public information about sentencing matters.

# 1. Introduction

- Background to this report
- Structure of this report

## BACKGROUND TO THIS REPORT

1.1 This Report marks the final stage of the New South Wales Law Reform Commission's ("NSWLRC") inquiry into juror involvement in the sentencing of offenders. It follows from the reference given to us by the former Attorney General, the Hon Bob Debus MLC, to investigate whether the presiding judge in a criminal trial by jury "might, following a finding of guilt, and consistent with the final decision remaining with the judge, consult with the jury on aspects of sentencing".

1.2 The former Attorney General referred the issue of juror participation in sentencing to the Commission as a result of an address delivered by his Honour James Spigelman AC, Chief Justice of the Supreme Court of New South Wales, entitled "A New Way to Sentence for Serious Crime".<sup>1</sup> In that speech, the Chief Justice suggested various improvements to current sentencing procedures. One of those suggestions was to investigate the possibility of involving the jury in the sentencing process. The essence of the Chief Justice's proposal is that, after a jury has found an accused person guilty of a particular criminal offence, the jury should continue to have a role in a process of in camera consultations with the trial judge before any sentence is imposed on the accused. This would enhance the jury's role beyond that of fact-finders determining the accused's guilt or innocence.

1.3 The Chief Justice did not suggest that the jury should actually determine the sentence, as occurs in some United States jurisdictions.<sup>2</sup> Nor did he put forward the proposal as a means of increasing the level of sentences, and made it clear that he did not believe that it would have that effect. The Chief Justice offered the view that the process of consultation would improve the quality of sentencing decisions and enhance public confidence in sentencing. He suggested that judges would welcome assistance from a spectrum of opinion reflecting a diversity of experience. He observed that the sentencing process could be improved by a judge being able to draw on a broad range of experience. Further, the Chief Justice considered that enabling judges to consult with jurors as to the actual reasons for the jury's guilty verdict, which are currently concealed by the secrecy surrounding their deliberations, would assist the sentencing process.

### Issues Paper 27

1.4 The Commission released an Issues Paper in June 2006 inviting discussion on the matters raised by the Chief Justice.<sup>3</sup> That Paper generated significant media attention.<sup>4</sup> Particular attention was drawn to:

1. The Honourable JJ Spigelman AC, Chief Justice of New South Wales, "A New Way to Sentence for Serious Crime", (Address for the Annual Opening of Law Term Dinner for the Law Society of New South Wales, Sydney 31 January 2005).
2. See ch 3 for a discussion of jury sentencing in the United States.
3. New South Wales Law Reform Commission, *Sentencing and Juries*, Issues Paper 27 (June 2006) ("IP 27").
4. Richard Macey, "Juries may set penalties", Sydney Morning Herald, 26 July 2006; Simon Benson, "Juries to set sentences", Daily Telegraph, 26 July 2006; Simon Benson, "Judge pushed people power", Daily Telegraph, 26 July 2006; "Don't

- Public perceptions concerning the current sentencing process, and how that impacts on public confidence.
- The likely effect that introducing a role for jurors in sentencing would have on public confidence levels, sentencing decisions and the jurors themselves.
- The type of input that jurors should have, eg, being asked by the judge to explain why they found the defendant guilty, or giving their views on questions that relate directly to sentencing.
- The practical and procedural questions that would need to be resolved before any proposal for involving the jury in the sentencing process could be implemented.

## Consultation process

### *Submissions overview*

1.5 The Commission received 22 submissions in response to IP 27. Those submissions were from current and former District and Supreme Court judges, organisations representing the legal profession and civil liberties groups, together with several submissions from interested members of the public, including former jurors.<sup>5</sup> All but one of those submissions opposed the suggestion that juries should have a direct role in determining sentence following the conviction of an offender.<sup>6</sup>

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sentence the jury to judges role”, Editorial, Daily Telegraph, 26 July 2006; Janet Fife-Yeomans, “Australia’s own reality court show: Judge Jury”, Daily Telegraph, 26 July 2006; Paul Sheehan, “Finally, the law might loosen its grip on the jury”, Sydney Morning Herald, 27 July 2006; Tim Dick, “Lawyers pan jury idea”, Sydney Morning Herald, 27 July 2006; Simon Benson, “Lawyers reject jury sentences”, Daily Telegraph, 27 July 2006; “The verdicts are in for jury sentencing”, Daily Telegraph, 27 July 2006; “Juries fully occupied in reaching a verdict”, Letters to the Editor, Daily Telegraph, 27 July 2006; “Jury involvement in sentencing not fair, threatens consistency”, Newcastle Herald, 27 July 2006; Alix Drew, “Jurors may have greater role”, Daily Liberal, 27 July 2006 “Lawyers sceptical about jury sentencing”, Daily Liberal, 27 July 2006; “Move for jury sentencing help”, Hobart Mercury, 26 July 2006; Terry Sweetman, “Jury out on sentencing reform”, Courier Mail, 28 July 2006; Drew Cratchley, “Public divided on the question of jury sentencing”, Illawarra Mercury, 29 July 2006; Megan Kinninment, “Sentencing is not a role for jurors”, Northern Star, 31 July 2006; J Roberts, “Juries lack legal insight”, Daily Telegraph, 7 August 2006.

5. A full list of individuals and organisations who made submissions to this Inquiry can be found in the Appendix to this Report. The views expressed in submissions are discussed extensively in chapters 4 and 5.
6. Australian Labor Party, Kincumber Region, Submission, 20 August 2006. That submission recommended that juries should be able to make sentencing recommendations, and that those recommendations should be based on shared community perspectives.

1.6 The overwhelming majority considered that the current situation should remain, with the jury having no role following the verdict. This view is held for the following reasons:

- any advantage that may occur from any actual or perceived increase in public confidence would be outweighed by the “possible distortions of the trial process and sentencing phase”, and an erosion of the integrity of the jury system;<sup>7</sup>
- jury involvement is unlikely to produce more consistent or significantly different sentencing outcomes;<sup>8</sup>
- the practical difficulties of jury involvement in sentencing are too great, and cannot be overcome without importing unfairness into trial and sentencing phase;<sup>9</sup>
- sentencing is a complex process, and as such, it would be difficult if not impossible, to educate jurors to the extent that they could give considered advice to the judge in sentencing;<sup>10</sup>
- it would create a two-tier system of justice causing inequality between trials heard by a jury and trials heard by a judge alone;<sup>11</sup> and
- the issue of a real or perceived lack of public confidence in the criminal justice system would be better addressed through community education about current sentencing practices.<sup>12</sup>

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7. NSW Council for Civil Liberties, Submission, 1 September 2006; NSW Bar Association, Submission, 1 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Judge John Goldring, Submission, 16 August 2006; Judge Michael Finnane, Submission, 7 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Legal Aid NSW, Submission, September 2006.
  8. NSW Council for Civil Liberties, Submission, 1 September 2006; Public Defenders' Office, Submission, 18 September 2006.
  9. NSW Council for Civil Liberties, Submission, 1 September 2006; NSW Bar Association, Submission, 1 September 2006; The Hon Gordon J Samuels, Submission, 13 August 2006; Judge John Goldring, Submission, 16 August 2006; Justice R O Blanch, Submission, 31 July 2006; Judge Michael Finnane, Submission, 7 August 2006.
  10. NSW Council for Civil Liberties, Submission, 1 September 2006; NSW Bar Association, Submission, 1 September 2006; The Hon Gordon J Samuels, Submission, 13 August 2006; Judge John Goldring, Submission, 16 August 2006; Public Defenders' Office, Submission, 18 September 2006.
  11. NSW Bar Association, Submission, 1 September 2006. See also Judge M Sides, Submission, 28 July 2006; Judge G D Woods, Submission, 28 July 2006; Justice RO Blanch, Submission, 31 July 2006; Judge Michael Finnane, Submission, 7 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006.
  12. NSW Bar Association, Submission, 1 September 2006; Judge John Goldring, Submission, 16 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006; Andrew Vincent, La Trobe University, Submission, 6 September 2006.

## Conferences and seminars

1.7 The Commission also participated in a number of conferences and seminars following the release of IP 27. For example, our Chairperson, the Hon James Wood AO QC, hosted a session at the Government Lawyers Continuing Legal Education Conference,<sup>13</sup> and participated in a seminar in conjunction with the University of Sydney Law School and the Institute of Criminology.<sup>14</sup> The Commission also presented a paper at the Australia New Zealand Jury Research and Practice Conference.<sup>15</sup> At the request of the Human Rights and Equal Opportunity Commission, we also participated in, and presented a paper at, the People's Assessors Research Seminar in Hainan, China.<sup>16</sup>

## STRUCTURE OF THIS REPORT

1.8 In Chapter 2 of this Report, the Commission discusses the law and practice setting out the factors that judges must consider when sentencing an offender. In Chapter 3, we look at the input that the jury may currently make with regard to sentencing in NSW. This is contrasted with a brief study of the role of the jury in other jurisdictions.

1.9 The views expressed in submissions concerning the desirability of involving jurors to a greater extent in the sentencing process are detailed in Chapter 4. Having considered those views, we recommend that any perceived benefits of adopting the proposal would be significantly outweighed by the practical difficulties of its implementation, together with concerns regarding the impact of the proposal on the right to a fair trial. Finally, the Commission considers the issue of public confidence in the sentencing process, since concerns about confidence levels was one of the major drivers of the Chief Justice's proposal. We recommend that taking measures to improve community awareness and public education regarding the current sentencing process would be more effective in boosting confidence levels.

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13. Held in Sydney on 12 September 2006.

14. The seminar, entitled *Masters of Fact and Law? A Place for Juries in Sentencing?*, was held in Sydney on 4 October 2006.

15. Held at the University of Canberra Law School, 10 November 2006.

16. Held on 13-15 November, 2006. The seminar was held as part of the China-Australia Human Rights Judicial Co-operative Program.

## 2 Sentencing procedure

- Introduction
- Sentencing - general principles and current procedures

## INTRODUCTION

2.1 The Commission's recommendations concerning the role of juries in sentencing can only be fully understood in the context of current sentencing practices. Accordingly, this chapter outlines the law and procedure that bind judges in NSW when sentencing offenders.

## SENTENCING - GENERAL PRINCIPLES AND CURRENT PROCEDURES

2.2 Section 80 of the Commonwealth Constitution enshrines the right of a person charged with one or more offences against Commonwealth law to have the trial of those offences heard before a jury, where they are tried on indictment. However, that right to trial by jury extends only to the determination of guilt or innocence.<sup>1</sup> In all States and Territories of Australia, a judicial officer, and only a judicial officer, can impose a sentence on an offender once his or her guilt has been established.<sup>2</sup>

2.3 A conviction for an offence may occur either through the accused entering a plea of guilty, or following a trial in which the accused has been found guilty beyond reasonable doubt. Where an offence is tried without a jury, the judge or magistrate will determine both the verdict and the appropriate punishment.<sup>3</sup> Should the offence be tried on indictment before a jury, the jurors will determine the question of guilt before being discharged. The presiding judge will alone determine the sentence, following an examination of relevant considerations.

### The sentencing hearing

2.4 The sentencing hearing will generally be held a few weeks after the trial has concluded. This gives the Probation and Parole Service, or the Department of Juvenile Justice,<sup>4</sup> time to prepare any reports that have been requested by the court, or are required by law, concerning the offender's background, time in detention, and prospects of rehabilitation. The hearing is generally held in open court,<sup>5</sup> and any member of the public, including the jurors who decided the verdict, may attend the sentencing hearing. Both the defence and the prosecution have the opportunity to present oral or documentary

1. See *Savvas v The Queen* (1995) 183 CLR 1. That right also extends only to offences under Commonwealth law. The *Jury Act 1977* (NSW) is the statutory basis for jury trial procedure in NSW.
2. There is a wealth of authority for this point, but see generally *R v De Simoni* (1981) 147 CLR 383, 392; *Kingswell v The Queen* (1985) 159 CLR 264, 276; *Savvas v The Queen* (1995) 183 CLR 1, 8; *Cheung v The Queen* (2001) 209 CLR 1, [14], [16].
3. Note that all trials in the Local Courts will be held without a jury: jury trials occur only in the Supreme and District Courts.
4. See *Children (Criminal Proceedings) Act 1987* (NSW) s 25.
5. *R v Foster* (1992) 25 NSWLR 732. Exceptions exist where the offender is a child (*Children (Criminal Proceedings) Act 1987* (NSW) s 10); or where the Court has directed that the proceedings be held in camera, eg, in a trial involving a prescribed sexual offence (*Criminal Procedure Act 1986* (NSW) s 291A).

evidence at the hearing. The defence counsel may call witnesses to attest to the offender's general good character, psychiatric state, remorse, and prospects of rehabilitation. These matters may be tested or contradicted by evidence called by the prosecution.

## Factors judges may consider

2.5 Judges have a wide discretion in determining the appropriate level of penalty in each case.<sup>6</sup> A judge must have regard to a number of factors, such as the nature of the crime and the maximum penalty for a particular offence specified by statute.<sup>7</sup> Judges also have access to information about sentencing precedents and statistics through the Sentencing Information System ("SIS"). This assists in achieving consistency, and in ensuring that the sentence passed falls within the appropriate range.

2.6 Judges will apply the general principles of sentencing when determining appropriate penalties in each case. For example, one of the factors judges will consider when sentencing is proportionality: that is, ensuring that the punishment fits the crime.<sup>8</sup> Consistency between sentences is also an important principle. For example, judges look to be fair when imposing sentences to avoid inappropriate disparities between punishments given to co-offenders. They also endeavour to achieve consistency by ensuring that the sentence is within the range for similar offences.<sup>9</sup>

2.7 Another factor is the totality of the sentence. If an offender is convicted of more than one offence, he or she will receive more than one sentence. The judge will determine the appropriate sentence for each offence, consider questions of cumulation or concurrence, and determine whether the aggregate sentence is just and appropriate for the overall level of criminal behaviour. The approach of making the individual sentences wholly or partially concurrent is now preferred to that of lowering some or all of the sentences below that which would otherwise be appropriate.<sup>10</sup> On occasions, the judge

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6. The desirability of having broad judicial discretion has been espoused by the courts and elsewhere: see, eg, *R v Whyte* (2002) 55 NSWLR 252; and New South Wales Law Reform Commission, *Sentencing*, Report 79 (1996), [1.7] ("NSWLRC Report 79").
  7. For the relevance of the statutory maximum, see *Markarian v The Queen* (2005) 215 ALR 213, where the High Court discussed the reasoning involved in the process of sentencing.
  8. *Veen v The Queen (No 2)* (1988) 164 CLR 465; *Bugmy v The Queen* (1990) 169 CLR 525; and *R v Whyte* (2002) 55 NSWLR 252, [152]. For a detailed discussion of proportionality, see New South Wales Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996), [3.35]-[3.37] ("NSWLRC DP 33").
  9. See *Lowe v The Queen* (1984) 154 CLR 606; *Postiglione v The Queen* (1997) 189 CLR 295; and *R v Morgan* (1993) 70 A Crim R 368, 371. See also NSWLRC DP 33, [3.38]-[3.40].
  10. See *Pearce v The Queen* (1998) 194 CLR 610; *Postiglione v The Queen* (1997) 189 CLR 295; and *R H McL v The Queen* (2000) 74 ALJR 1319. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4, Division 2.

may also be required to take into account any additional offences that the offender acknowledges and asks to be considered.<sup>11</sup>

2.8 In addition to these general principles, judges will also have regard to any aggravating or mitigating factors that may exist in each specific case.<sup>12</sup>

#### *Aggravating and mitigating factors*

2.9 The aggravating and mitigating circumstances to which a judge will have regard are set out in the *Crimes (Sentencing Procedure) Act 1999* (NSW). The judge may decide on a penalty at the higher end of the scale depending on whether the following aggravating factors are present:

- the victim was a police officer, emergency services worker, correctional officer, judicial officer, health worker, teacher, community worker, or other public official, exercising public or community functions and the offence arose because of the victim's occupation;
- the offence involved the actual or threatened use of violence, or of a weapon;
- the offender has a record of previous convictions,<sup>13</sup> or the offence was committed while the offender was on conditional liberty in relation to another offence or alleged offence;
- the offence was committed in company, or was part of a planned or organised criminal activity;
- the offence involved gratuitous cruelty;
- the injury, emotional harm, loss or damage caused by the offence was substantial;
- the offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (such as people of a particular religion, racial or ethnic origin, language, sexual orientation or age, or having a particular disability);
- the offence was committed without regard for public safety;
- the offender abused a position of trust or authority in relation to the victim;
- the victim was vulnerable, for example, because the victim was very young or very old or had a disability, or because of the victim's occupation (such as a taxi driver, bank teller or service station attendant); or
- the offence involved multiple victims or a series of criminal acts.<sup>14</sup>

2.10 The mitigating factors that may result in a lower penalty are:

- the injury, emotional harm, loss or damage caused by the offence was not substantial;
- the offence was not part of a planned or organised criminal activity;

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11. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3, Division 3. See also *Markarian v The Queen* (2005) 215 ALR 213.

12. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21 and s 21A.

13. Although only for the limited purposes noted in *R v Shankley* [2003] NSWCCA 253.

14. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2).

- the offender was provoked by the victim, or was acting under duress;
- the offender does not have any record (or any significant record) of previous convictions;
- the offender was a person of good character;
- the offender is unlikely to re-offend, or has good prospects of rehabilitation, whether by reason of the offender's age or otherwise;
- the offender has shown remorse for the offence by making reparation for any injury, loss or damage or in any other manner;
- the offender was not fully aware of the consequences of his or her actions because of the offender's age or any disability;
- a plea of guilty by the offender;<sup>15</sup>
- the degree of pre-trial disclosure by the defence;<sup>16</sup> or
- the offender provided assistance to law enforcement authorities.<sup>17</sup>

2.11 A judge may also consider the length of time the offender has already spent in custody in relation to the offence, and compliance with obligations under any community service order, good behaviour bond or intervention program order.<sup>18</sup>

#### *Victim Impact Statements*

2.12 In certain circumstances, a judge may consider a victim impact statement ("a VIS") before determining an appropriate sentence. As the name suggests, a VIS is a document prepared by, or on behalf of, a victim of crime, describing the impact that the crime has had on the life of the victim or the victim's family. The court may only receive a VIS in relation to an offence heard on indictment that resulted in the death of, or actual physical bodily harm caused to, the victim; or an offence resulting in actual or threatened violence, including sexual assault.<sup>19</sup> There is no obligation on the victim to prepare a VIS,<sup>20</sup> or on the court to receive or consider one.<sup>21</sup> However, where the victim has died as a direct result of the crime for which the offender has been convicted, and the victim's family has

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15. The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the sentencing court must take into account any guilty plea made by a defendant, and may accordingly impose a lesser sentence than that which would otherwise be appropriate: s 22.
  16. The *Crimes (Sentencing Procedure) Act 1999* (NSW) states that the court may impose a lesser penalty than it would otherwise impose on an offender in circumstances where the offender has made pre-trial disclosures for the purposes of the trial: s 22A.
  17. Section 23 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a court may impose a lesser penalty than it would otherwise impose on an offender, having regard to the degree to which the offender has assisted, or undertaken to assist, law enforcement authorities in the prevention, detection or investigation of, or in proceedings relating to, the offence concerned or any other offence. The full list of mitigating factors is contained in *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3).
  18. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 24.
  19. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 27.
  20. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 29.
  21. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28.

prepared a VIS, the court must receive and acknowledge the VIS, and may make any comment on it that it considers appropriate.<sup>22</sup>

2.13 If the court chooses, it may receive and consider a VIS at any time after conviction and prior to sentencing.<sup>23</sup> The court may make the VIS available to the prosecutor, the offender or any other person, subject to any conditions it considers appropriate.<sup>24</sup> The victim, or a representative of the victim, may read all or part of the VIS to the court during the sentencing hearing.<sup>25</sup>

#### *Sentencing guidelines*

2.14 Judges must also consider any relevant sentencing guidelines.<sup>26</sup> In NSW, the Attorney General may request the Court of Criminal Appeal to consider delivering a guideline judgment on a particular question of law, without the need for an appeal on that matter to have been brought before the Court.<sup>27</sup> Alternatively, the Court may give a judgment of its own motion.<sup>28</sup> Guideline judgments may indicate appropriate factors to consider when sentencing for specific offences, but may not be made with respect to particular offenders.<sup>29</sup>

2.15 Guideline judgments serve as templates for structuring judicial discretion. They are not binding on judges, but act as an additional factor that judges must consider in exercising their sentencing discretion.<sup>30</sup> The judgments are intended as a tool to enhance sentencing consistency, while not detracting from the need for judges to exercise discretion when determining penalties based on the particular facts and circumstances of each case.<sup>31</sup> In introducing the legislative scheme in 1998, the Government stressed the balance between sentencing consistency and the free exercise of judicial discretion as being crucial to maintaining public confidence in the justice system.<sup>32</sup> Since 1998, guideline judgments have been handed down in relation to seven areas of law.<sup>33</sup>

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22. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(3). Where the crime involves the death of a victim, a VIS by a member of the family which deals only with the effect of the death upon the family, has been held to be irrelevant to the sentence being imposed: *R v Previtera* (1997) 94 A Crim R 76; and *R v Bollen* (1998) 99 A Crim R 510.

23. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(1).

24. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 28(5).

25. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 30A.

26. In NSW, guideline judgments are underpinned by formal, legislative requirements: see *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3, Division 4.

27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37. The Court is not required to give a guideline judgment if it considers it inappropriate to do so: s 40.

28. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37A.

29. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 37(3).

30. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 42A.

31. For a discussion of the function and operation of guideline judgments, see Justice James Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876; and *R v Whyte* (2002) 55 NSWLR 252.

32. See NSW, *Parliamentary Debates (Hansard)* Legislative Assembly, 28 October 1998, 9190 (the Hon Gabrielle Harrison MP for the Hon Paul Whelan MP, Attorney General). This was the Second Reading Speech introducing the *Criminal Procedure*

*Purposes of sentencing*

2.16 In deciding on an appropriate sentence, a judge also keeps in mind the purposes of the penalty. The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the court may impose a sentence on an offender for the following purposes:

- (a) to ensure that the offender is adequately punished for the offence;
- (b) to prevent crime by deterring the offender and other persons from committing similar offences;
- (c) to protect the community from the offender;
- (d) to promote the rehabilitation of the offender;
- (e) to make the offender accountable for his or her actions;
- (f) to denounce the conduct of the offender; and
- (g) to recognise the harm done to the victim of the crime and the community.<sup>34</sup>

**Constraints on sentencing discretion**

2.17 In *Cheung v The Queen*, Justice Kirby set out the four relevant constraints on a sentencing judge's discretion.<sup>35</sup> First, a judge must act within, and in accordance with, any applicable statutory provision. Secondly, an offender may only be sentenced for an offence regarding which he or she has pleaded guilty, or been convicted by a court.<sup>36</sup> Consistent with this, a judge may only consider evidence during sentencing that has been

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*Amendment (Sentencing Guidelines) Act 1998* (NSW). That Act was subsequently repealed and incorporated into the *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 3 Division 4.

- 33. Those areas are: Dangerous driving (*R v Jurisic* (1998) 45 NSWLR 209 - reformulated in *R v Whyte* (2002) 55 NSWLR 252); Armed robbery (*R v Henry* (1999) 46 NSWLR 346); Drug importation (*Wong & Leung* (1999) 48 NSWLR 340 - overruled in *Wong v The Queen*; *Leung v The Queen* (2001) 76 ALJR 79); Break, enter and steal (*R v Ponfield* (1999) 46 NSWLR 327); Effect of a guilty plea on sentence (*Thomson & Houlton* (2000) 49 NSWLR 383); Effect of an admission of guilt relating to other offences (*Attorney General's Application No 1 of 2002* (2002) 56 NSWLR 46); and high range prescribed content of alcohol (*Attorney General's Application No 3 of 2002* (2004) 6 NSWLR 305). A further application by the Attorney General requesting guidelines relating to assault on a police officer was refused by the Court of Criminal Appeal (*Attorney General's Application No 2 of 2002* [2002] NSWCCA 515).
- 34. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.
- 35. (2001) 209 CLR 1, [99].
- 36. *R v De Simoni* (1981) 147 CLR 383.

agreed upon by both counsel or proved by the prosecution,<sup>37</sup> and may only rely on evidence that has been made known to the offender.<sup>38</sup>

2.18 Next, where the jury has delivered a verdict, a judge must not impose a sentence that conflicts with that verdict.<sup>39</sup> Where there is more than one possible basis for the jury's verdict, the judge must determine the factual basis for the verdict,<sup>40</sup> by reference to the evidence which is before the Court at the sentencing hearing.<sup>41</sup> The sentencing judge may form his or her own view of the facts upon which the jury based their decision, provided this does not conflict with the jury's verdict.<sup>42</sup>

2.19 Finally, judges must be satisfied beyond reasonable doubt of those facts which are adverse to the accused, upon which any sentence is based.<sup>43</sup> Judges must also give reasons for the sentences they impose, setting out the facts they considered to be aggravating or mitigating factors.<sup>44</sup>

## Sentencing options

2.20 Following a plea or a finding of guilt, the court determines the appropriate penalty. In some instances, usually relating to the least serious of offences, the court may, without proceeding to a conviction, direct that the charge be dismissed.<sup>45</sup> The Court may also make an order discharging the offender on the condition that he or she enters into a good behaviour bond,<sup>46</sup> or agrees to participate in an intervention program, and comply with that program.<sup>47</sup>

2.21 Where the court determines that some form of penalty is warranted, it must decide between custodial and non-custodial options. In some circumstances, that choice may be limited by statute, since imprisonment is not available as a choice for all offences. Where a custodial sentence is available, the court should only sentence an offender to prison after having considered all other alternatives.<sup>48</sup> If the Court determines that no penalty other than imprisonment is appropriate, it must determine what the length of that sentence

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37. *R v O'Neill* [1979] 2 NSWLR 582.

38. *Stanton v Dawson* (1987) 31 A Crim R 104.

39. *R v Ford* (1994) 75 A Crim R 398; *R v Harris* (1961) VR 326; *R v Isaacs* (1997) 41 NSWLR 374.

40. This can often be a difficult task, as noted by the Chief Justice in his speech. See [3.10] of this Report for further discussion on this point.

41. *R v O'Neill* [1979] 2 NSWLR 582; *Chow v DPP* (1992) 28 NSWLR 593.

42. *Savvas v The Queen* (1995) 69 ALJR 564; *Maxwell v The Queen* (1996) 184 CLR 501.

43. Matters favourable to the accused need only be proved on the balance of probabilities. For a more detailed explanation of the role of fact finding in sentencing, see *Weininger v The Queen* (2003) 212 CLR 629.

44. *R v O'Neill* [1979] 2 NSWLR 582; and *R v SG* (2003) NSWCCA 220.

45. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10.

46. For a period of up to 2 years: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(b).

47. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1)(c) and Part 8C.

48. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 5(1).

should be. Then, the Court must consider any available alternatives to serving the sentence of imprisonment by way of full-time custody.<sup>49</sup> Judges determine the nature and length of any custodial sentence having regard to the subjective and objective factors discussed above.<sup>50</sup>

2.22 Imposing a custodial sentence does not always mean that the offender must serve that sentence on a full-time basis. Where an offender is sentenced to imprisonment for a period of not more than three years, the court may direct that the sentence be served by way of periodic detention.<sup>51</sup> Where the sentence of imprisonment is not more than 18 months, the court may make a home detention order.<sup>52</sup>

2.23 In other cases, non-custodial sentencing options may be available. They include community service orders,<sup>53</sup> good behaviour bonds,<sup>54</sup> suspended sentences,<sup>55</sup> deferred sentences,<sup>56</sup> fines,<sup>57</sup> and non-association or place restriction orders.<sup>58</sup>

#### *Non-parole periods*

2.24 When sentencing an offender to imprisonment for an offence, a Court is first required to set a non-parole period for the sentence. This refers to the minimum period for which the offender must be kept in detention in relation to the offence. The Court must then set the balance of the term of the sentence. That balance must not exceed one-third of the non-parole period, unless the Court decides that there are special circumstances for increasing it, in which case the Court must provide reasons for that decision.<sup>59</sup>

2.25 A Court may not set a non-parole period for a sentence if the term of imprisonment is six months or less.<sup>60</sup> Where the Court imposes a sentence of imprisonment for a term of three years or less, being a sentence that has a non-parole period, it must make an order directing the release of the offender on parole at the end of the non-parole period.<sup>61</sup>

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49. *R v Douar* [2005] NSWCCA 455.

50. See [2.5]-[2.11] above. The statutory provisions governing sentencing procedures for imprisonment are contained in the *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4.

51. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6 and Part 5.

52. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7 and Part 6.

53. The court may order an offender complete up to 500 hours of community service: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8 and Part 7.

54. A good behaviour bond may extend for up to 5 years: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 9 and Part 8.

55. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 12.

56. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.

57. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 2 Division 4.

58. These are orders preventing the offender from associating with a specified person, or frequenting or visiting a specified place or district, for a stated amount of time: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A and Part 8A.

59. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44. The meaning of "special circumstance" was considered in *R v Simpson* (2001) 53 NSWLR 704 and *R v Way* (2004) 60 NSWLR 168.

60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

2.26 When the offence is one which falls within the category of offences for which standard non-parole periods have been prescribed by statute, then that is the non-parole period which is to be set. However, the Court may determine that there are reasons for setting a non-parole period that is longer or shorter than the standard non-parole period prescribed for that offence.<sup>62</sup>

## Reaching a sentencing decision

2.27 The task of reaching a decision as to an appropriate sentencing option is a difficult and complex one. Judges in NSW must draw on a vast body of accumulated knowledge, including:

- the provisions of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes Act 1914* (Cth);<sup>63</sup>
- a significant body of case law illustrating the sentencing principles discussed above;
- the sentencing ranges for each offence in respect of which an offender is convicted;
- any relevant guideline judgments;
- an understanding of sentencing statistics and their relevance; and
- an awareness and understanding of the significance of any mitigating factors that may be specifically relevant to the offender (for example, the opportunities, or lack thereof, for rehabilitation, potential hardships that may be faced by offenders with life-threatening illnesses, etc).

2.28 In determining an appropriate sentence, judges for the most part use one of two competing methodologies.<sup>64</sup> The first, known as the “two stage” or “two tier” approach, refers generally to the practice of first considering the more objective circumstances of the offence, such as the gravity of the crime, to determine a notional starting point for sentencing within the allowable statutory range for a particular offence. Then, that starting point is adjusted following consideration of the more subjective factors relating to the particular circumstances of the offender, resulting in the final sentence determination.<sup>65</sup> For example, a judge may decide that a certain sentence is appropriate considering the circumstances of the offence committed, and then discount a proportion of the sentence if the offender has entered a guilty plea.<sup>66</sup>

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62. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4 Division 1B. For the application of these provisions, see *R v Way* (2004) 60 NSWLR 168, and *R v Davies* [2004] NSWCCA 319.

63. When sentencing offenders convicted of offences against Commonwealth law.

64. These categorisations are general only, and do not otherwise limit the exercise of judicial discretion: see *Markarian v The Queen* (2005) 215 ALR 213, [27] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

65. Note that legislation sometimes requires judges to specify how much a sentence has been discounted due to certain factors: see *Crimes Act 1914* (Cth) s 21E.

66. See *Thomson & Houlton* (2000) 49 NSWLR 383 and *R v Sharma* (2002) 54 NSWLR 300 for the effect of a guilty plea on sentencing.

2.29 The alternative approach is known as “instinctive synthesis”, whereby judges consider all of the relevant factors simultaneously and arrive at one final sentence determination. Which of these methodologies is preferred has long been the subject of debate.<sup>67</sup> Both approaches have been criticised: the two stage approach for being too mathematically rigid and more likely to give rise to errors; and the instinctive synthesis method for lacking sufficient precision and transparency to enable the reasons for the sentence to be clearly understood.

2.30 In the recent case of *Markarian v The Queen*,<sup>68</sup> the majority of the High Court stated that much confusion surrounds the terms and attempts to define and categorise them, and that there can be no universal rule stating that one method should always be adopted over the other.<sup>69</sup>

*In general, a sentencing court will, after weighing all of the relevant factors, reach a conclusion that a particular penalty is the one that should be imposed....*

*[I]t cannot now be doubted that sentencing courts may not add and subtract item by item from some apparently subliminally derived figure, passages of time in order to fix the time which an offender must serve in prison. That is not to say that in a simple case, in which, for example, the circumstances of the crime have to be weighed against one or a small number of other important matters, indulgence in arithmetical deduction by the sentencing judges should be absolutely forbidden. An invitation to a sentencing judge to engage in a process of “instinctive synthesis”, as useful as shorthand terminology may on occasions be, is not desirable if no more is said or understood about what that means. The expression “instinctive synthesis” may then be understood to suggest an arcane process into the mysteries of which only judges can be initiated. The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends. This case was not however one of them because of the number and complexity of the considerations which had to be weighed by the trial judge.<sup>70</sup>*

## Who may have input into sentencing?

2.31 While it is the judiciary who ultimately determine penalties in each case, others also play a role in sentencing. That role may be an over-arching one: setting the policies

67. See, eg, *AB v The Queen* (1999) 198 CLR 111; *Wong and Leung v The Queen* (2001) 207 CLR 584; *Cameron v The Queen* (2002) 209 CLR 339; *R v Sharma* (2002) 54 NSWLR 300; *R v Whyte* (2002) 55 NSWLR 252; and *Markarian v The Queen* (2005) 215 ALR 213.

68. [2005] 215 ALR 213.

69. *Markarian v The Queen* (2005) 215 ALR 213, [36] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

70. *Markarian v The Queen* (2005) 215 ALR 213, [37], [39] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

that guide sentencing law and practice; or may be specifically related to penalty outcomes in particular cases.

#### *Courts*

2.32 Obviously, the courts, through judicial officers, have the most direct involvement in sentencing by imposing penalties in each case where an offender pleads guilty to, or is convicted of, an offence. As well as sentencing in individual cases, the courts also establish sentencing precedent, particularly by issuing guideline judgments.<sup>71</sup>

#### *Parliament*

2.33 Judicial discretion in selecting appropriate sentences exists subject to the power of Parliament to enact legislation setting maximum penalties for criminal offences, and restricting the type of penalty available for certain offences. Generally in New South Wales, as well as in other Australian jurisdictions, there has been resistance to the idea of Parliament curtailing judicial discretion by prescribing minimum penalties for offences. However, in 1999, Parliament introduced minimum life sentences for murder and for serious drug trafficking offences in certain circumstances,<sup>72</sup> and standard non-parole periods for certain offences.<sup>73</sup>

#### *The parties*

2.34 During the trial, counsel for both sides tender evidence, much of which will be relevant to sentencing in the event that the defendant is found guilty. At the sentencing hearing, the prosecution and defence counsel may present further evidence concerning the offender's subjective circumstances. This may include evidence as to character, prior convictions, psychiatric or psychological status, potential hardship arising from the manner in which the sentence will be served, previous performance on parole, etc, with a view to persuading the judge to hand down either a lenient or more severe sentence.

#### *Victims*

2.35 People who have been the victims of certain crimes, or who have lost family members as a result of a violent crime, may have some input into the sentencing process by preparing a Victims Impact Statement. The circumstances in which a VIS may be relevant are discussed at paragraph 2.12-2.13 above.

2.36 Victims of crime may also be assisted by groups such as the Enough is Enough Anti-Violence Movement, the Victims of Crime Assistance League (VOCAL), or the Homicide Victims Support Group.<sup>74</sup> In addition to providing support for victims, these groups lobby for recognition of victims' rights in the criminal justice system. Representatives from these groups are members of the Sentencing Council of NSW.

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71. See discussion at [2.14]-[2.15] above.

72. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 61. See also *R v Merritt* (2004) 59 NSWLR 557.

73. *Crimes (Sentencing Procedure) Act 1999* (NSW) Part 4 Division 1A.

74. Although these groups would not normally be allowed to participate in the sentencing procedure themselves.

*Specialist bodies*

2.37 The Sentencing Council of NSW was established in 2003 to provide independent advice to the Government on sentencing policy and practice. Set up under the *Crimes (Sentencing Procedure) Act 1999* (NSW),<sup>75</sup> the Sentencing Council comprises of 13 representatives from the judiciary, the police, the criminal bar (both prosecutors and defenders), corrective services and juvenile justice officers, community representatives, victims' rights advocates and an Aboriginal justice specialist.<sup>76</sup> The Council's main functions are to advise and consult with the Attorney General in relation to offences suitable for standard non-parole periods and for guideline judgments; to monitor, and report annually on, sentencing trends and practices; and to prepare reports to the Attorney General (upon request) on particular aspects of sentencing law.<sup>77</sup> An amendment to the *Crimes (Sentencing Procedure) Act 1999* (NSW) in late 2006 resulted in the Sentencing Council's functions being expanded to include a public education role.<sup>78</sup> This is discussed in further detail in Chapter 4.

2.38 In welcoming the establishment of the Sentencing Council, the former Attorney General noted the likelihood of it generating robust debate and controversial recommendations. He observed that the Sentencing Council "will provide an invaluable opportunity for the wider community to make a major contribution to the development of sentencing law and practice".<sup>79</sup> To date, the Sentencing Council has prepared reports on the effect of abolishing short prison sentences, the application of standard non-parole periods to certain offences, how best to achieve consistency in sentencing in the Local Courts, and on the use and enforcement of fines and penalties.<sup>80</sup> The Council also prepares an annual review of sentencing trends and practices.<sup>81</sup>

2.39 The Judicial Commission also has input into sentencing. In addition to organising and supervising the continuing education and training of judges in NSW, the Judicial Commission assists the courts in achieving consistency in sentencing.<sup>82</sup> In carrying out this task, the Judicial Commission maintains databases (such as the Judicial Information Research System "JIRS",<sup>83</sup> and the SIS)<sup>84</sup>. The Judicial Commission also produces judicial officers' bulletins and empirical studies of sentencing practice across NSW courts.

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75. Part 8B. For information concerning the Sentencing Council's functions, membership and publications,

see «[www.lawlink.nsw.gov.au/sentencingcouncil](http://www.lawlink.nsw.gov.au/sentencingcouncil)».

76. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I.

77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J.

78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(e).

79. New South Wales, *Parliamentary Debates* (Hansard), Legislative Assembly, *Crimes (Sentencing Procedures) Amendment (Standard Minimum Sentencing) Bill 2002* (NSW), 23 October 2002, 5818 (Second Reading Speech by the Hon RJ Debus MP, Attorney General).

80. See «[www.lawlink.nsw.gov.au/sentencingcouncil](http://www.lawlink.nsw.gov.au/sentencingcouncil)» for details.

81. See, eg, NSW Sentencing Council, *Report on Sentencing Trends and Practices 2005-2006*, accessed at «[www.lawlink.nsw.gov.au/scouncil/](http://www.lawlink.nsw.gov.au/scouncil/)».

82. See «[www.jc.nsw.gov.au](http://www.jc.nsw.gov.au)».

83. Dealing with sentencing principles and practice.

84. Dealing with sentencing statistics.

Other, more generalist, research organisations, such as this Commission,<sup>85</sup> the Bureau of Crime Statistics and Research,<sup>86</sup> and the Criminal Law Review Division within the Attorney General's Department,<sup>87</sup> have also reported on aspects of NSW sentencing law and policy.

*The media and the public*

2.40 The media play an important role as a conduit of information between the justice system and the community. They are in a position to inform the public about sentencing decisions and practices, and to encourage public debate. As such, they are able to guide and comment upon public opinion in relation to sentencing outcomes and practices, and to affect public confidence levels in the criminal justice system.

2.41 In *Markarian v The Queen*,<sup>88</sup> Justice McHugh recently observed:

*Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact on the democratic process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.*<sup>89</sup>

*The jury*

2.42 Australian jurors play no direct or defined role in determining an appropriate sentence for the offender whom they have found guilty. However, they may indirectly affect a sentence handed down to an offender in a number of ways. For example, a jury may return a guilty verdict with a recommendation to the judge that the offender be treated with leniency with respect to the sentence he or she is given. While the judge must consider the expression of such a view and treat it with respect, he or she is not bound by it when determining the sentence.<sup>90</sup> Jurors may also have an indirect impact on sentencing, for example, where they deliver a special verdict, or a verdict of guilty on an

85. See, eg, NSWLRC Report 79; New South Wales Law Reform Commission, *Sentencing: Aboriginal Offenders*, Report 96 (2000); New South Wales Law Reform Commission, *Sentencing: Corporate Offenders*, Report 103 (2003). See also New South Wales Law Reform Commission, *Sentencing: Young Offenders*, Report 104 (2006).

86. Examples of fairly recent publications by the Bureau of Crime Statistics and Research dealing with sentencing issues include S Moffatt, D Weatherburn and J Fitzgerald, "Sentencing Drink Drivers: The Use of Dismissals and Conditional Discharges" (2004) 81 *Crime and Justice Bulletin*; J Fitzgerald, "Trends in Sentencing in the New South Wales Criminal Courts: 1990-2000" (2001) 62 *Crime and Justice Bulletin*; and J Baker, "Are the Courts Becoming More Lenient? Recent Trends in Convictions and Penalties in NSW Higher and Local Courts" (1998) 40 *Crime and Justice Bulletin*. For a full list, see «[www.lawlink.nsw.gov.au/bocsar](http://www.lawlink.nsw.gov.au/bocsar)».

87. See «[www.lawlink.nsw.gov.au/clrd](http://www.lawlink.nsw.gov.au/clrd)» for further details.

88. (2005) 215 ALR 213.

89. (2005) 215 ALR 213, [236].

90. *Whittaker v The King* (1928) 41 CLR 230.

alternative count. The ways in which jurors can currently have a peripheral effect on sentencing through their verdicts is discussed in Chapter 3.

### 3. **Juries and sentencing – a comparative overview**

- Introduction
- Recommendations for leniency
- Asking juries to determine specific facts relevant to sentencing
- Other jurisdictions

## INTRODUCTION

3.1 This chapter discusses the role the jury currently plays in determining sentences in criminal trials. As noted in the previous chapter, in Australia, there is no formally defined role for the jury in the sentencing process.<sup>1</sup> On the contrary, it has long been considered fundamental to the fair and effective administration of justice in Australia that the jury's role be limited to finding the facts that support their verdict, and that it is the responsibility of the judge to determine the appropriate sentence.<sup>2</sup>

3.2 However, there are currently a number of ways in which the jury might provide indirect input into sentencing in the course of their role as fact finders during the trial. This chapter discusses two of those ways in detail, namely:

- the jury's ability to recommend mercy or leniency; and
- where jurors are invited to return a special verdict by which they answer specific questions of fact that may also have an impact on sentencing. These types of jury involvement in sentencing occur during the course of delivering a verdict.

3.3 While the issue of jury involvement in sentencing is restricted to academic debate in this country, it has been long-standing practice in other jurisdictions.<sup>3</sup> For example, in some parts of the United States, juries not only make recommendations regarding appropriate sentencing, but are responsible for imposing the sentence. Juries in some European countries also participate to varying degrees in sentencing decisions as part of a panel, sitting with professional judges.

## RECOMMENDATIONS FOR LENIENCY

3.4 When a jury returns a verdict of guilty, it may, if it chooses, recommend to the judge that the offender be given leniency. That recommendation does not constitute part

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1. See *Cheung v The Queen* (2001) 209 CLR 1, [6], where Gleeson CJ, Gummow and Hayne JJ noted that trial by jury in this country does not include sentencing by a jury. It was held that there was no requirement under the Commonwealth Constitution for the jury to be asked to state the basis on which a guilty verdict was reached, or for it to decide contested facts relevant to sentencing.
  2. *Cheung v The Queen* (2001) 209 CLR 1.
  3. We note one specific circumstance where a form of jury sentencing existed in Australia. Prior to amendments to the *Defence Force Discipline Act 1982* (Cth) made in 2006, the procedure for courts martial involving Australian military personnel was somewhat analogous to jury sentencing. Defence force personnel would effectively sit as a jury panel along with a Judge Advocate, and consult on matters of verdict and sentence. The courts martial system was replaced in 2006 by the creation of the Australian Military Court, to be presided over by independently appointed military judges rather than general service officers: see the Hon Bruce Billson MP, Minister Assisting the Minister for Defence, "Landmark Reforms of Australia's Military Justice System", accessed at «[www.minister.defence.gov.au/Billsontpl.cfm?CurrentId=6232](http://www.minister.defence.gov.au/Billsontpl.cfm?CurrentId=6232)».

of the verdict.<sup>4</sup> There is no legislative recognition in NSW of the jury's right to recommend leniency.<sup>5</sup> However, a number of cases have referred to the power, either explicitly or implicitly.<sup>6</sup> The definitive High Court statement can be found in *Whittaker v The King*,<sup>7</sup> where Justice Isaacs said:

*[I]t is of course the duty of a judge who has the difficult task of determining the proper sentence to be imposed upon a person convicted of a crime to take into his consideration a recommendation by the jury for mercy. But it must be emphasised that it is not part of the verdict; it does not bind the trial judge; it operates only as a recommendation, and the responsibility in the interests of society to impose an appropriate sentence commensurate with the seriousness of the crime remains with the trial judge. It in no way absolves the trial judge from the duty of considering the circumstances of the crime independently for himself, and it in no way requires him to put any remote or strained interpretation upon the facts to find some justification for the rider.<sup>8</sup>*

3.5 The weight given to such a recommendation will depend on individual judges and the circumstances of each case.<sup>9</sup> Since jury recommendations are not binding, a plea for mercy is only one of a number of factors a judge will need to consider when deciding on an appropriate penalty.<sup>10</sup> Indeed, the courts have cautioned against trial judges relying too heavily on what they perceive to be the jury's finding of fact behind a recommendation for mercy:

*Human nature being what it is, such recommendations are not always based upon reason or upon logic. They may be based upon all kinds of considerations, and such things as sentiment, a spirit of compromise, a misunderstanding of the true situation, and a host of other things, may be responsible for them. A Judge is not bound to act upon such a recommendation, if, in his opinion, the circumstances do not justify it, and if the jury in the present case had been asked upon what they based their recommendation—and I think that it is to be regretted that they were not asked—it might have appeared that it did not rest upon any substantial basis and was not entitled to be given any real weight.<sup>11</sup>*

4. *R v Tappy* [1960] VR 137.

5. The Australian Capital Territory is the only Australian jurisdiction to have legislated the jury's power to recommend leniency: see *Crimes Act 1900*(ACT) s 342.

6. See, eg, *Myerson v The King* (1908) 5 CLR 596; *R v Dickson* (1865) 4 SCR (NSW) 298; *R v Tappy* [1960] VR 137; *Whittaker v The King* (1928) 41 CLR 230; *R v West* [1979] Tas R 1; *R v Harris* [1961] VR 236; *R v Wingrove* (1936) 53 WN(NSW) 118.

7. (1928) 41 CLR 230.

8. (1928) 41 CLR 230, 240.

9. Some courts are more dismissive of jury recommendations on the grounds that punishment is the province of the judge not the jury: see *R v Tappy* [1960] VR 137.

10. The other factors a judge must consider are discussed at [2.5]-[2.16] of this Report.

11. *R v Whittaker* (1928) 28 SR (NSW) 411, 420 (Street CJ). See also *R v Millward* (1931) 23 Cr App R 119.

3.6 The above quotation raises the issue of whether or not the judge should ask the jury their reasons for making a recommendation of mercy. In *R v Wingrove*,<sup>12</sup> the NSW Court of Criminal Appeal determined that, where the recommendation is framed in a way that throws doubt on the basis for the jury's guilty verdict, the judge should ask the jury what they mean by recommending that the offender be treated leniently. However, apart from this limited circumstance, the Court was of the view that a judge should not make further enquiries of a jury that qualifies a verdict by way of a recommendation for leniency.<sup>13</sup>

3.7 Neither the judge, nor counsel for either side, may expressly invite the jury to make a comment as to the leniency of the sentence should they choose to convict the defendant.<sup>14</sup> Generally, a jury is not even informed, either before retiring to deliberate or upon returning to deliver their verdict, of their right to recommend that the judge impose a lenient sentence should they choose to convict. Nor are they informed of the possible sentencing options or the maximum available sentence. In Report 48, we recommended that, while the power of a jury to express an opinion as to leniency should be preserved, so too should the current practice of not informing the jury of this power, unless they ask whether they may qualify their verdict in such a manner.<sup>15</sup> This is to mitigate against the temptation to deliver a compromise guilty verdict: that is, finding the defendant guilty on the condition that a lenient punishment be imposed.<sup>16</sup> Similar considerations apply to the practice of not disclosing to the jury details of the sentence and the sentencing options that are available.

3.8 Presumably, the power of a jury to make a recommendation as to the leniency of sentence also extends to making a recommendation that the judge impose a sentence at the more severe end of the scale. However, we are not aware of any cases where this has occurred.

## ASKING JURIES TO DETERMINE SPECIFIC FACTS RELEVANT TO SENTENCING

3.9 It is the primary role of the jury to determine whether or not the evidence presented during the trial leaves them satisfied beyond reasonable doubt that the defendant committed a specific offence, or offences, listed in the indictment. Sometimes, the jury is presented with alternative offences, which may be expressly charged, or available as statutory alternatives. In such a case, the jury must decide whether the facts support a finding of guilt in relation to offence A or offence B, or neither offence. Since offence A and offence B are likely to have different maximum penalties prescribed by statute, the jury's finding of guilt regarding one offence but not the other, indirectly affects the sentence the offender may receive. In this way, jurors can have de facto involvement in sentencing as a by-product of their role as determiners of guilt.

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12. (1936) 53 WN (NSW) 118.

13. *R v Wingrove* (1936) 53 WN(NSW)118, 118 -119.

14. *R v Black* [1963] 1 WLR 1311.

15. New South Wales Law Reform Commission, *Criminal Procedure: The Jury in a Criminal Trial*, Report 48 (1986), Recommendation 73 ("NSWLRC Report 48").

16. NSWLRC Report 48, [8.15]. See [4.13] of this Report for a discussion of the danger of jury sentencing leading to compromise verdicts.

3.10 The jury's general guilty verdict will not always reveal the facts found to have been proved. While this does not affect the verdict, the answers to these facts may be significant in determining the appropriate sentence. A classic example is the difference between murder and manslaughter. Where a jury decides an offender is guilty of manslaughter but not of murder, it is not always clear whether that verdict was returned because the jury had a doubt as to whether the offender had the requisite intention or state of mind required for murder, or whether some other factor, such as provocation, excessive self defence, intoxication or substantial impairment by abnormality of mind, was involved. Since the penalty for manslaughter can vary considerably depending on the presence or absence of these (and other) factors, it may be useful for a judge to know the basis for the jury's findings.

3.11 In certain circumstances, a judge may invite the jury to deliver a special verdict by answering specific questions concerning issues of fact which arise in the trial.<sup>17</sup> The courts have held that, while it is open to juries to deliver special verdicts, they may only answer specific questions of fact that relate to the elements of the offence identified on the indictment, and not those matters that relate to sentence only.<sup>18</sup> In *Kingswell v The Queen*,<sup>19</sup> the defendant was charged with conspiring to import narcotics into Australia under s 233B of the *Customs Act 1901* (Cth). That section stated that a person found guilty of that offence was punishable as provided by s 235 of the *Customs Act 1901* (Cth). The appropriate penalty provided for under s 235 depended on the Court being satisfied of a number of factual matters, including the quantity of the narcotics involved. One of the questions raised in *Kingswell* was whether the matters of fact to be determined under s 235 were elements of the offence (due to the combined operation with s 233B), or were matters that related only to sentencing.

3.12 The High Court held that the jury was not empowered to give a special verdict relating to the facts identified in s 235 as circumstances of aggravation relevant to sentencing, as they were not issues pertaining to the elements of the offence in s 233B as specified on the indictment. In his judgment, Justice Brennan stated:

*A jury which is charged to try the issues on an indictment is not at liberty to find facts which are not pertinent to those issues. It has long been established that, if a jury returns a special verdict, its verdict must be confined to the issues which it is sworn to try, else a finding on any other issue is... void.*<sup>20</sup>

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17. See *Thompson v The Queen* (1989) 169 CLR 1, 30. See also *Cheung v The Queen* (2001) 209 CLR 1, [19], where Gleeson CJ, Gummow and Hayne JJ stated that it was not necessary to decide whether a jury could be compelled, as distinct from invited, to return a special verdict, as this had not been raised in submissions by either side.

18. See *Kingswell v The Queen* (1985) 159 CLR 264; *Cheung v The Queen* (2001) 209 CLR 1; and *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238.

19. (1985) 159 CLR 264.

20. *Kingswell v The Queen* (1985) 159 CLR 264, 287. Although Justice Brennan's judgment in this case was a dissenting one (on other grounds), the reasoning of the majority does not imply error in the passage quoted.

3.13 In *Cheung v The Queen*,<sup>21</sup> a jury found Cheung guilty of having been knowingly concerned in the importation into Australia of a commercial quantity of heroin. The trial judge then imposed a sentence based on his findings as to the extent of Cheung's involvement in the crime. On appeal, it was argued on Cheung's behalf that denying the jury the right to determine facts that are critical to the type and length of the sentence imposed is a denial of the right to a jury trial under s 80 of the Commonwealth Constitution.<sup>22</sup>

3.14 The High Court discussed the respective roles of the judge and jury as finders of facts relevant to sentencing. In the course of this discussion, the High Court confirmed that the role of the jury is to determine the matters of fact on which issue is joined by a plea of not guilty. The issue of whether a special verdict should have been obtained from the jury to clarify its view of the facts was raised in oral argument, but was not argued at trial or on appeal, and so was not considered in detail by the High Court. However, Justice Kirby expressed cautious approval of asking jurors specific questions of fact to ensure, as closely as possible, that the sentence is in line with the basis for the jury's verdict:

*... at least where the potential difference for sentencing is as substantial as it was in this case, it is desirable, and certainly permissible, to seek from the jury answers to questions (or a special verdict) concerning the basis upon which they have convicted the prisoner.*<sup>23</sup>

3.15 It was also suggested that, where possible, defendants could be charged with alternative offences, so that a jury's decision to convict on one but not the other, would make the basis of their verdict clear for the purposes of sentencing.<sup>24</sup> Further, some members of the Court were sympathetic to the view that the prosecution should frame the indictment as specifically as possible to enable the jury to make its views clear on each factual issue relevant to the offence.<sup>25</sup>

3.16 However, all arguments advocating a greater role for the jury in sentencing failed in *Cheung's* case. The High Court held that the nature of the accused's motive for becoming involved in the crime, and the extent of his involvement, while relevant to sentencing, was not an element of the particular offence charged and not, therefore, a matter to be resolved by the jury.<sup>26</sup> In rejecting the constitutional argument, the Court stated that the:

*procedure involved the trial judge, following a jury verdict of guilty, reviewing the evidence for himself for the purpose of making findings on matters of fact which were necessary for sentencing, and which were not resolved by the jury's verdict. Such a procedure does not involve any infringement of a right to trial by jury. It involves the application of well-established principles*

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21. (2001) 209 CLR 1.

22. Section 80 provides for the right to trial by jury for defendants charged on indictment with Commonwealth offences.

23. *Cheung v The Queen* (2001) 209 CLR 1, [133] (Kirby J).

24. *Cheung v The Queen* (2001) 209 CLR 1, [71]-[74], [86] (Gaudron J).

25. *Cheung v The Queen* (2001) 209 CLR 1, [132] (Kirby J), [160] (Callinan J).

26. *Cheung v The Queen* (2001) 209 CLR 1, [7] (Gleeson CJ, Gummow and Hayne JJ).

*as to the division of functions which are, and were in 1900, an aspect of trial by jury.*<sup>27</sup>

3.17 The majority were of the view that, while the jury would have heard evidence relevant to sentencing issues, and some jurors may have relied on some of that evidence in deciding the guilty verdict, the jury can, and should, in no way be seen as deciding all facts of possible relevance to sentencing.<sup>28</sup>

## OTHER JURISDICTIONS

### Recommendations as to parole eligibility in Canada

3.18 In Canada, there is provision under the Criminal Code for juries to make recommendations to the court regarding an offender's eligibility for parole, following a finding of guilt on a charge of second degree murder.<sup>29</sup> Prior to discharging the jury, the judge shall put to them the following question:

*You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.*

3.19 Canadian courts have held that the jury's recommendation as to the offender's eligibility for parole is only one factor that should be considered in determining questions of parole.<sup>30</sup> The court have also made it very clear that any recommendation made by the jury should be based solely on the evidence presented during the trial, with no further submissions specifically relating to sentence being allowed.<sup>31</sup> The provision is not intended to bring the jury any further into the sentencing process.<sup>32</sup>

3.20 The power of the jury to make recommendations on parole has generated controversy. In the case of *Latimer*, the jury recommended a minimum period of parole ineligibility of 12 months after convicting a defendant of the mercy killing of his severely

27. *Cheung v The Queen* (2001) 209 CLR 1, [55] (Gleeson CJ, Gummow and Hayne JJ).

28. *Cheung v The Queen* (2001) 209 CLR 1, [7] (Gleeson CJ, Gummow and Hayne JJ).

29. See *Criminal Code* (Canada) s 745.2.

30. *R v Joseph* (1984) 15 CCC (3d) 314 (BCCA); and *R v Van Osselaer* (2004) 181 CCC (3d) (BCCA).

31. *R v Nepoose* (1988) 46 CCC (3d) 421 (Alta CA); *R v Okhuatsiak* (1993) 80 CCC (3d) 251 (Nfld CA); and *R v Poirier* (2005) 193 CCC (3d) 303 (Ont CA).

32. *R v Cruz* (1998) 124 CCC (3d) 157 (BCCA).

disabled 12 year old daughter. Although imposed by the trial judge, the sentence was overturned on appeal and the mandatory 10 year minimum period was imposed.<sup>33</sup>

## Jury sentencing in the United States of America

3.21 American juries have had a role in sentencing ever since the War of Independence in 1776, which ended English rule over the American colonies. In the early days of the colony, people were suspicious of the arbitrary power exercised by Crown appointed judges, and were eager to cast off the vestiges of English colonial rule.<sup>34</sup> The early colonists saw juries as being far better suited than judges to determine the extent to which the defendant's behaviour deviated from the socially accepted norms.

### *Jury sentencing in capital crimes*

3.22 The usual punishment for crime in the American colonies was death. Consequently, early American juries were involved in sentencing for capital crimes. That historical role continues today, with juries playing a part in the sentencing of offenders convicted of federal capital offences, and in the thirty-eight states that have offences punishable by death. This was made certain in *Ring v Arizona*,<sup>35</sup> where the United States Supreme Court determined that only juries, and not judges, could find the existence of aggravating factors necessary to invoke the death penalty. In all capital sentencing jurisdictions, including federal proceedings, judges may impose a lesser sentence than that recommended by the jury, but may not increase the sentence beyond the jury's finding.<sup>36</sup>

3.23 In order not to contravene the constitutional prohibition against cruel and unusual punishment,<sup>37</sup> sentencing procedures for capital punishment must be tightly structured so as to avoid arbitrariness and capriciousness.<sup>38</sup> In general terms, this means ensuring that criminal statutes specify aggravating and mitigating factors to which jurors may have

33. See *R v Latimer* (2001) 150 CCC (3d) 129 (SCC).

34. For an account of the history of jury sentencing in America, see Jenia Iontcheva, "Jury Sentencing as Democratic Practice" (2003) 89 *Virginia Law Review* 311; Adriaan Lanni, "Jury Sentencing in Non-capital Cases: An Idea Whose Time Has Come (Again)?" (1999) 108 *Yale Law Journal* 1775; Nancy J King, "The Origins of Felony Jury Sentencing in the United States" (2003) 78 *Chicago-Kent Law Review* 937; and Morris B Hoffman, "The Case for Jury Sentencing" (2003) 52 *Duke Law Journal* 951. See also NSWLRC IP 27, [2.18]-[2.43].

35. 122 S Ct 2428 (2002). The Court extended the ruling in *Apprendi v New Jersey* 530 US 466 (2000) to capital proceedings, by deciding that denying juries the power to decide the facts on which a death sentence is based is a contravention of the Sixth Amendment to the US Constitution (guaranteeing the right to a fair trial).

36. See *Ring v Arizona* 122 S Ct 2428 (2002). Judges may stipulate that a maximum term of life imprisonment should have a lifetime non-parole period: 18 *United States Code* s 3594. Note that while judges, appellate courts and State Governors may in fact make the final decision in capital cases, juries must not be told that the ultimate responsibility for determining the death penalty rests with an authority other than them: see *Caldwell v Mississippi* 472 US 320 (1995).

37. Found in the Eighth Amendment to the US Constitution.

38. See *Furman v Georgia* 408 US 238 (1972).

regard when considering the appropriateness of the death penalty. Also, the verdict and sentencing stages are separated into two distinct hearings, so that jurors do not hear prejudicial evidence concerning the defendant's character and prior convictions until after the verdict has been delivered.

*Jury sentencing in non-capital offences*

3.24 In addition, six American states also involve juries to varying degrees in the sentencing of non-capital offences. In Arkansas, Kentucky, Missouri, Oklahoma, Texas, and Virginia, juries decide on appropriate sentences for offenders convicted of offences for which discretionary terms of imprisonment, fines, or both, are available. In reality, jury sentencing occurs in only a very small number of non-capital cases,<sup>39</sup> since over ninety percent of matters are plea bargained.<sup>40</sup>

3.25 In all of these states, the same jury that delivered the guilty verdict determines the sentence the offender will receive.<sup>41</sup> However, unlike the tight statutory regulation of capital sentencing, there is no uniformity of procedure between jury sentencing states in terms of non-capital crimes. The most significant variation between jury sentencing states is whether or not the trial is separated into two distinct stages for determining guilt and punishment. Five of the six jury sentencing states have a bifurcated format: meaning that the sentencing takes place in a separate proceeding after the trial has concluded.<sup>42</sup> There are also differences between the states as to whether or not a defendant may elect to be sentenced by a judge rather than a jury,<sup>43</sup> and also in relation to the types of offences that may be sentenced by juries. Also, the sentencing options that jurors may select from differ from state to state, as does the issue of whether or not the sentences are subject to parole.<sup>44</sup>

*Commentary on jury sentencing in the United States*

3.26 Critics in the United States claim jury sentencing to be costly, time-consuming, unnecessary and antiquated; that jurors lack the expertise of judges, which can lead to

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39. It is estimated that approximately 4000 United States juries hand down sentences for non-capital offences each year: see Nancy J King and Rosevelt L Noble, "Felony Jury Sentencing in Practice: A Three-State Study" (2004) 57 *Vanderbilt Law Review* 885, 887.

40. Iontcheva, 355. Plea bargaining involves a deal between the prosecuting and defence attorneys, whereby the accused agrees to plead guilty, but to a lesser offence than the one with which he or she was initially charged. In some states, a defendant may still choose to be sentenced by a jury even after entering a guilty plea. However, this is almost never done in practice for fear of upsetting the bargain struck with the prosecution: see Iontcheva, 355 and King and Noble, 894.

41. See Iontcheva, 354.

42. Those states are Arkansas, Kentucky, Missouri, Texas and Virginia. In Oklahoma, juries decide on guilt and penalty in the same proceedings for first time offenders. However, proceedings are bifurcated for offenders with a criminal history.

43. For example, in Kentucky and Arkansas, the defendant cannot be sentenced by a judge following a jury trial unless the prosecution consents: King and Noble, 903-904, 934. Virginian law prohibits judicial sentencing following a guilty verdict at a jury trial: King and Noble, 919.

44. King and Noble, 891-892.

disproportionate or inconsistent sentences that are based on prejudice rather than solid evidence.<sup>45</sup> Others note that the criminal justice systems in jury sentencing states do not provide non-capital sentencing juries with sufficient power and information to enable their effective functioning.<sup>46</sup>

3.27 Jury sentencing advocates are of the view that the arguments voiced against jury sentencing, such as jurors' lack of expertise and inability to handle complex issues, amount to a mistrust of the jury system as a whole.<sup>47</sup> Some claim that the perceived problems with non-capital jury sentencing could be addressed by importing many of the procedures already in place for capital cases: such as giving jurors clear instructions as to aggravating and mitigating factors, access to relevant sentencing guidelines, and more rigorous appellate review.<sup>48</sup>

3.28 Others have reached a more pragmatic conclusion, noting that non-capital jury sentencing is not an "obscure and curious appendage of an earlier age" but a critical component of modern sentencing policy.<sup>49</sup> Studies in three jury sentencing states have revealed that its practice bears little relation to the democratic ideals on which it is was traditionally based.<sup>50</sup> Rather than setting a benchmark reflecting community expectations, researchers found that jury sentencing is favoured by prosecutors as a means of encouraging guilty pleas.<sup>51</sup> The study also found that jury sentencing can operate as a convenient tool to place accountability for any unpopular sentencing policy on jurors rather than criminal justice officials.<sup>52</sup> This is especially the case in jurisdictions with an elected judiciary.<sup>53</sup>

## Mixed jury panels

3.29 The European criminal justice system is characterised as a mixed jury system, the details of which vary between countries. It is said to be mixed because, like the "pure" jury systems of countries like Australia, Canada and the United Kingdom, jurors are drawn from a pool of randomly selected citizens.<sup>54</sup> However, there is not the same separation of

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45. See the arguments advanced in Hoffman, 985-991.

46. See, generally, King (2004).

47. See Iontcheva, 315; and Lanni.

48. See Iontcheva, 359; Lanni, 1802; and Hoffman, 1000-1011.

49. King and Noble, 889.

50. The study involved interviews with judges, prosecutors and defence attorneys from Arkansas, Kentucky and Virginia: see King and Noble, 890.

51. The concept of a "plea discount" (whereby the defendant receives a lesser penalty upon pleading guilty than would otherwise have been imposed following a trial resulting in a conviction) is a pervasive feature of American criminal justice. Consequently, many defendants prefer to plead guilty and be sentenced by a judge rather than risk the unpredictability of being tried and sentenced by a jury: see King and Noble, 895-940.

52. King and Noble, 889.

53. As one commentator put it: "Judges are elected, jurors are votes": King and Noble, 933.

54. Although German jurors tend to be selected because of their particular professional backgrounds: see Martin F Kaplan, Ana M Martin and Janine Hertel, "Issues and

functions between European judges and jurors as exists in our system. European jurors participate actively alongside professional judges in deciding questions of fact, law, verdict and penalty.<sup>55</sup>

3.30 In Germany and Poland, jurors participate only in trial courts, whereas French and Italian jurors play a role in both original and appeal courts.<sup>56</sup> Jurors may serve for the duration of the particular trial,<sup>57</sup> or for a particular length of time.<sup>58</sup> In most cases, lay judges outnumber the professional judges on a panel.<sup>59</sup> Despite this numerical superiority, evidence suggests that lay jurors are less likely to express their views than the professional judges, leading to the observation that it is “unclear whether optimum conditions exist in mixed juries for the free communication of lay juror views”.<sup>60</sup> This is perhaps not surprising given lay jurors’ lack of legal training and criminal trial experience in comparison with their professional counterparts, and the likelihood that the professional judges’ behaviour would be more assertive, with their views carrying greater sway.

3.31 In Japan, plans are underway to reintroduce a jury system following its abolition during the Second World War. It is expected that a mixed panel system of lay jurors and professional judges, based on the European model, will be operational by 2009. Japanese jury panels will comprise nine members: six lay and three professional. Lay jurors will participate in trials for serious criminal offences, and decide matters of verdict and sentence, including the death penalty, along with the professional judges. Decisions as to verdict and sentence must be made by a majority of the nine member panel, with at least one professional judge being in that majority.<sup>61</sup>

3.32 Although not yet introduced, the Japanese mixed jury model is already drawing controversy. Debate has centred over whether citizen participation in verdict and sentencing decisions will be effective in Japan, particularly given the absence of any form

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Prospects in European Juries: An Overview” in Martin F Kaplan and Ana M Martin (eds), *Understanding World Jury Systems Through Social Psychological Research* (Taylor and Francis, 2006), 113. This is largely due to the structure of the German justice system, which has a number of subject-specific courts.

55. See Martin F Kaplan, Ana M Martin and Janine Hertel, “Issues and Prospects in European Juries: An Overview” in Kaplan and Martin (eds), 111-121.

56. See Martin F Kaplan, Ana M Martin and Janine Hertel, “Issues and Prospects in European Juries: An Overview” in Kaplan and Martin (eds), 112.

57. As in France, Russia and Spain.

58. As in Italy, Germany and Poland.

59. For example, Italian jury panels are comprised of six lay and two professional members, French panels have nine lay and three professional members. The only deviation is in Germany in relation to serious criminal cases, which are heard by panels of two lay and three professional members: See Martin F Kaplan, Ana M Martin and Janine Hertel, “Issues and Prospects in European Juries: An Overview” in Kaplan and Martin (eds), 112.

60. See Martin F Kaplan, Ana M Martin and Janine Hertel, “Issues and Prospects in European Juries: An Overview” in Kaplan and Martin (eds), 118.

61. See Yohsuke Ohtsubo, “On Designing a Mixed Jury System in Japan” in Kaplan and Martin (eds), 199-212. See also Lester W Kiss, “Reviving the Criminal Jury in Japan” in Neil Vidmar (ed), *World Jury Systems* (Oxford University Press, 2000), 353-379.

of jury system for two generations, and the Japanese cultural tendency to defer to authority.<sup>62</sup>

*Requirement to provide reasons for verdict*

3.33 Juries have recently been reintroduced in Russia and Spain.<sup>63</sup> Unlike most other European countries that have a mixed panel system with professional and lay judges, juries in Russia and Spain are composed completely of randomly selected lay jurors, more akin to juries in common law countries.<sup>64</sup> However, like their European counterparts, Russian and Spanish juries have input into sentencing decisions. Their deliberation process is also subjected to tighter controls than that of common law juries. This can be seen in part as providing greater assistance to jurors, and partly as a sign of a lack of trust in a newly reintroduced lay institution.

3.34 A distinguishing feature of both the Russian and Spanish jury systems is that juries are required to deliver not only a general verdict of guilty or not guilty, but must also answer a series of specific questions tailored to each particular charge. Those questions consist of a number of statements, either favourable or unfavourable to the accused, and the jury must decide whether they support or reject each proposition. Questions may concern the facts alleged by either party during the trial phase, the elements of the offence with which the accused is charged, and the existence of any aggravating or mitigating factors that may affect the accused's criminal responsibility.<sup>65</sup> The questions list needs to be carefully considered and logically structured so as to guide the jury's reasoning.

3.35 Spanish juries are also asked to provide a rationale for each of their answers, noting the evidence on which they relied.<sup>66</sup> If a jury delivers a guilty verdict, the judge asks whether it wants to recommend clemency, or that the sentence be suspended.<sup>67</sup> Of a nine member jury panel, seven votes are needed to support a specific proposition or a guilty verdict, whereas only five are needed to support a verdict of not guilty or a recommendation on sentence.<sup>68</sup>

3.36 While there has been little direct research on the effect on jury decision-making of such a detailed questions list and the requirement of verdict justification,<sup>69</sup> there is

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62. See Yohsuke Ohtsubo, "On Designing a Mixed Jury System in Japan" in Kaplan and Martin (eds), 200-204.

63. Juries were restored in Russia in 1993 and in Spain in 1995 as part of the democratisation process in both countries: see Ana M Martin and Martin F Kaplan, "Psychological Perspectives on Spanish and Russian Juries" in Kaplan and Martin (eds), 71. See also Stephen C Thaman, "Europe's New Jury Systems: The Cases of Spain and Russia" in Vidmar (ed), 319-351.

64. Note that the Russian system also has a mixed panel of lay assessors. In certain cases, the defendant may choose between a three judge panel, a mixed panel of professional and lay judges, or a completely lay jury: see Martin and Kaplan in Kaplan and Martin (eds), 72.

65. Martin and Kaplan in Kaplan and Martin (eds), 73.

66. Martin and Kaplan in Kaplan and Martin (eds), 74.

67. Martin and Kaplan in Kaplan and Martin (eds), 73.

68. Martin and Kaplan in Kaplan and Martin (eds), 73.

69. See Kaplan, Martin and Hertel in Kaplan and Martin (eds), 120.

evidence to suggest that juries find the questions list complex and ambiguous.<sup>70</sup> Confusion among jurors seems to be particularly apparent with regard to the aggravating and mitigating factors relevant to sentencing.<sup>71</sup> Although judges endeavour to avoid using legal terminology, they have had more success at this during the trial stage rather than during sentencing.<sup>72</sup>

## Conclusion

3.37 The overseas examples provide an interesting counterpoint in our examination of jury involvement in sentencing. However, they are of limited relevance in NSW. So far as jury sentencing in the United States is concerned, the constitutional basis of jury sentencing in death penalty cases creates a very different environment from that in NSW. The logistics of sentencing in capital crimes is also far too different from other cases to be a useful comparison. In non-felony cases, the bulk of commentators consider jury sentencing to be unworkable and anachronistic.<sup>73</sup> The fact that it adds uncertainty to the sentencing process, and may be used to encourage guilty pleas and absolve judicial officers from sentencing responsibility is also cause for concern.

3.38 The Canadian situation can be seen as analogous to the position in NSW whereby a jury may recommend leniency. The main difference is that trial judge in Canada is under an obligation to inform the jury of their right to make a recommendation. As we noted at paragraph 3.7 above, the practice in NSW is for judges not to inform juries of their ability to recommend that a lenient sentence be handed down. We are of the view that this practice should continue, since the jury should not be distracted from its primary role of delivering a verdict based on sound reasoning by considerations of sentence severity.

3.39 The civil law systems of Europe make it difficult to import elements of their jury panels into our own system. Criminal trials are structured around inquisitorial rather than adversarial proceedings, with civil law jurors taking a much more active role than their common law counterparts. The different constitutional circumstances of European nations also means comparisons need to be treated with caution. This is particularly so with regard to Russia and Spain, where juries have been reintroduced as part of a move toward democratisation.

3.40 To sum up, there is little or no evidence from the jurisdictions we have studied to suggest that juror involvement in sentencing decisions produces fairer, or more reasoned and consistent, sentencing outcomes. There is, however, a plethora of academic commentary highlighting the drawbacks of jury sentencing. Consequently, we are of the view that overseas experiences of jury sentencing offer no support for the proposal to involve NSW juries in sentencing to any greater degree than at present.

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70. Martin and Kaplan in Kaplan and Martin (eds), 74-76.

71. Martin and Kaplan in Kaplan and Martin (eds), 76.

72. Martin and Kaplan in Kaplan and Martin (eds), 74.

73. As noted in one submission, it is fair to say that the “systems of criminal justice in those states are not often mentioned as flag-bearers in the movement for the improvement of the justice system”: Public Defenders’ Office, Submission, 18 September 2006.

## 4. Should juries have a role in sentencing?

- Introduction
- Public confidence in sentencing decisions
- Implications for a fair trial
- Natural justice concerns
- Practical and procedural difficulties
- The Commission's conclusion

## INTRODUCTION

4.1 All but one of the 22 submissions received in response to IP 27 opposed the suggestion that juries should have a direct role in determining sentence following the conviction of an offender.<sup>1</sup> Submissions opposed the idea on the grounds that:

- public confidence in sentencing was not faltering, and so the rationale for the proposal was flawed;
- the proposal gives rise to serious natural justice considerations;
- it would be unlikely to produce any positive effects on sentencing or public confidence; and
- the practical and procedural difficulties in implementing the proposal are so significant as to render it unworkable in any event.

4.2 These views support the Commission's conclusion that jurors should not play any greater role in the sentencing process than they do at present.

## PUBLIC CONFIDENCE IN SENTENCING DECISIONS

4.3 One of the major rationales for proposing juror involvement in sentencing is the need to bolster public confidence in the administration of justice. It is undisputed that public confidence in all aspects of the criminal justice system is crucial to its effective functioning. However, as pointed out in IP 27, attempting to articulate the exact nature of public confidence at any point in time is a difficult exercise.<sup>2</sup> Public confidence in criminal justice, including sentencing decisions, is generated by public opinion, which is in turn influenced significantly by media reporting. It is generally taken for granted that media reports of public opinion on certain subjects are accurate and well-founded. However, research has shown that public opinion is far more diverse than the impression given through the media.<sup>3</sup> It is also quite malleable, and can be changed and manipulated depending on the facts presented and the questions asked. Further, there is no single set of views that constitutes public opinion at any given time.

4.4 Views concerning public confidence in sentencing decisions were expressed in submissions. Some disagreed with the premise underlying the proposal for juror involvement in sentencing, namely that public confidence in the justice system is lacking. Rather, they considered that views expressed through the more vocal sections of the media do not necessarily represent true public opinion.<sup>4</sup> While public confidence in the administration of justice is important, this should not be confused with transitory views

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1. See [1.5]-[1.6].

2. See [3.9]-[3.21]. See also the Hon Gordon J Samuels, Submission, 13 August 2006.

3. See discussion in IP 27, [3.11]-[3.21].

4. Judge John Goldring, Submission, 16 August 2006; the Hon Gordon J Samuels, Submission, 13 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006.

expressed through talk back radio and the tabloid press, which may hold no credence in the wider community.<sup>5</sup>

4.5 Some current and former members of the judiciary also disagreed with the suggestion implied in some outlets of the media that judges continually flout community expectations when handing down sentences.<sup>6</sup> While public confidence is a vital component in the effectiveness of the justice system, judges are not, and should not, be driven in their sentencing decisions by the public sentiment of the day.

4.6 The Commission considers that further work needs to be done to ascertain the true nature of public opinion and confidence in the criminal justice system. Regardless of whether public confidence levels are indeed as low as portrayed in the tabloid media, the fact that there is a perception that justice is not always being delivered in sentencing decisions, is in itself a cause for concern. However, we do not believe that poor public perceptions of sentencing decisions, even if true, should justify a reform as drastic as the one proposed.

4.7 We are of the view that the best way to address public confidence in the criminal justice system is through better public education, and explanations of the facts surrounding sentencing.<sup>7</sup> This is discussed further in the following chapter.

## IMPLICATIONS FOR A FAIR TRIAL

4.8 A major ground of objection to the proposal for allowing greater juror involvement in sentencing is the possibility of prejudicing a fair trial. In particular, jury sentencing could cause unfairness to the accused, and has the potential to cause jurors to compromise when delivering their verdict.

### Unfairness to accused

4.9 A number of submissions stated that jury sentencing creates a greater likelihood of bias in sentencing decisions. Concern was expressed that views on appropriate penalties or the severity of offences would be based on the personal views and experiences of jurors, rather than being decided according to law.<sup>8</sup> This could be a particular problem in cases of violent or sexual offences, where the accused has a criminal history, or where a

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5. The Hon Gordon J Samuels, Submission, 13 August 2006; NSW Bar Association, Submission, 1 September 2006; Public Defenders' Office, Submission, 18 September 2006.

6. The Hon Gordon J Samuels, Submission, 13 August 2006.

7. A number of submissions agree: see the Hon Gordon J Samuels, Submission, 13 August 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; and the Office of the Director of Public Prosecutions, Submission, 13 September 2006.

8. NM Aldridge, Submission, 27 July 2006; L Faure, Submission, 30 July 2006.

juror has been a victim of crime.<sup>9</sup> In these cases, the jury may give excessive weight to factors such as retribution.<sup>10</sup>

4.10 Submissions also suggested that juror involvement could fetter the types of matters raised in sentencing. For example, some factors, such as drug dependency, can operate to mitigate the severity of a sentence, but may be viewed harshly by jurors.<sup>11</sup> Some submissions suggested that fear of jury severity could lead to an increase in guilty pleas, as defendants may seek to avoid jury involvement in sentencing, as has occurred in the United States.<sup>12</sup> Further, some saw the possibility that the independence of the judiciary could be compromised if judges were required to consult with jury members prior to sentencing.<sup>13</sup> This reasoning led some submissions to express the view that sentencing should remain in the hands of legally qualified experts to ensure the “emotional insularity” necessary for a fair and just system.<sup>14</sup>

4.11 There is also the possibility that jury involvement could lead to increased inconsistency between sentences, since jurors would be dealing with each sentence on a one-off basis, without the benefit of training and experience.<sup>15</sup> This would be a particular problem where there are co-accused who have pleaded differently. Those pleading guilty would be sentenced by a judge only, whereas those entering a not guilty plea, but subsequently found guilty following a trial, would be sentenced by a judge after consultation with the jury. There would also be problems with joint Commonwealth/State trials where co-offenders had been tried separately and found guilty by different juries.<sup>16</sup>

4.12 In the Commission’s view, the benefits of enabling a greater public voice to be heard by judges during the sentencing process are offset by the problems raised in submissions. To a large extent, many of the concerns regarding the dangers of juror bias may be overstated, given that the proposal under consideration is not that the jury should be the ultimate arbiters of sentencing decisions: jurors would only express opinions to the judge, who would make the final decision after considering all relevant factors.<sup>17</sup> However, we are of the view that justice suffers whenever there is even the suggestion of bias or unfairness.

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9. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.
  10. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.
  11. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.
  12. NSW Bar Association, Submission, 1 September 2006; Public Defenders’ Office, Submission, 18 September 2006. See [3.21]-[3.28] of this Report for a discussion of jury sentencing in the United States.
  13. Judge John Goldring, Submission, 16 August 2006.
  14. L Faure, Submission, 30 July 2006.
  15. Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders’ Office, Submission, 18 September 2006.
  16. NSW Bar Association, Submission, 1 September 2006.
  17. The value of involving jurors in an advisory capacity only, gives rise to other issues, as discussed at [4.41]-[4.42] of this Report.

## Jury could compromise on the verdict

4.13 The issue of jury compromise leading to an unsound verdict was raised in IP 27, and was echoed in a number of submissions.<sup>18</sup> If jurors know that they are to play a role in sentencing a defendant following a guilty verdict, there is the danger that a jury could compromise on a verdict because they believe they will be able to influence a lenient sentence. This may result in more convictions in cases where there would otherwise have been an acquittal. At the very least, knowing that they will have to play a role in sentencing could distract jurors from their central fact finding role.<sup>19</sup>

## NATURAL JUSTICE CONCERNS

### In camera consultations

4.14 Perhaps the most contentious aspect of the proposal for jurors to be involved in sentencing is the secrecy of the discussions that would need to take place between the judge and the jurors. This was widely viewed in submissions as having the potential to compromise procedural fairness by cutting across the principle of open and transparent justice.<sup>20</sup>

4.15 Transparency of sentencing proceedings is consistent with the purpose and intention of the fair trial provisions contained in Article 14(1) and (3) of the *International Covenant on Civil and Political Rights*.<sup>21</sup> This transparency is respected in our current system, and the courts have repeatedly stressed its importance as part of the right of the accused not to be tried unfairly.<sup>22</sup>

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18. NSW Bar Association, Submission, 1 September 2006; Judge G D Woods, Submission, 28 July 2006; Judge John Goldring, Submission, 16 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006; Law Society of NSW, Submission, 8 September 2006.
19. Office of the Director of Public Prosecutions, Submission, 13 September 2006.
20. Judge John Goldring, Submission, 16 August 2006; Judge Michael Finnane, Submission, 7 August 2006; Judge M Sides, Submission, 28 July 2006; Judge Office of the Director of Public Prosecutions, Submission, 13 September 2006; James R Oxley, Submission, 28 July 2006; NM Aldridge, Submission, 27 July 2006; B Blackburn, Submission, 20 August 2006; L Faure, Submission, 30 July 2006; NSW Bar Association, Submission, 1 September 2006; Public Defenders' Office, Submission, 18 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Law Society of NSW, Submission, 8 September 2006; Legal Aid, NSW, Submission, September 2006.
21. See NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.
22. See *Dietrich v The Queen* (1992) 177 CLR 292; *R v Hovan* [2005] NSWCCA 179; *R v Smith*; *R v Jones* [2001] NSWCCA 279; *Cameron v R* (2002) 209 CLR 339; and *Markarian v The Queen* [2005] 215 ALR 213.

4.16 The accused, and the community, are entitled to know the basis on which sentencing decisions are made, and involving the jury in secret consultations on sentencing matters deprives them of that entitlement.<sup>23</sup> In camera consultations with jurors on sentencing matters would also be at odds with procedures conducted during the trial phase.<sup>24</sup> Some were of the view that in camera consultations between judge and jury would only create a new ground for appeal.<sup>25</sup>

4.17 In addition to objections in principle, there are also practical problems associated with in camera consultations. Counsel need to be sure that no extra material is provided to the jury and that appropriate directions are given.<sup>26</sup> Any input by jurors should be transparent so that parties can make submissions on it, and judges may refer to it in their reasons for sentence.<sup>27</sup> Accountability and transparency in sentencing is crucial so that any errors of fact or law can be corrected on appeal.<sup>28</sup> Without full disclosure of the basis on which sentence determinations are made, the appeal court would have to guess the nature and relevance of the jury's comments and the impact they may have had on the final sentence.<sup>29</sup>

4.18 In camera discussions between the judge and the jury could also create an ethical dilemma for the judge should those discussions cast doubt on the verdict.<sup>30</sup> The judge would be duty bound to expose an unsound verdict, yet would be constrained by the need to protect the confidentiality of jury deliberations.<sup>31</sup>

4.19 Submissions also noted the unlikelihood of the secrecy lasting. Individual jurors would be tempted to disclose their version of the discussions, particularly if they were unhappy with the sentence imposed.<sup>32</sup> This may be exacerbated in situations where there has been a majority verdict, and the dissenting juror feels excluded from the consultation process.<sup>33</sup> This could lead to disputes, and would place judges in an "invidious" position

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23. Judge Michael Finnane, Submission, 7 August 2006; Judge M Sides, Submission, 28 July 2006.

24. Judge Michael Finnane, Submission, 7 August 2006.

25. Law Society of NSW, Submission, 8 September 2006.

26. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

27. Judge M Sides, Submission, 28 July 2006; Judge Michael Finnane, Submission, 7 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006.

28. Public Defenders' Office, Submission, 18 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

29. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Judge Michael Finnane, Submission, 7 August 2006

30. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Judge G D Woods, Submission, 28 July 2006.

31. Judge G D Woods, Submission, 28 July 2006; Judge Michael Finnane, Submission, 7 August 2006.

32. Judge G D Woods, Submission, 28 July 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006.

33. Office of the Director of Public Prosecutions, Submission, 13 September 2006.

should they have to resolve disputes between jurors.<sup>34</sup> Public confidence would only be undermined as a result.<sup>35</sup>

4.20 We consider the nature of the consultations that would need to occur between judge and jury highly problematic. On the one hand, those discussions would need to be secret in order to protect the identity of individual jurors, and the confidentiality of their deliberations leading up to the verdict. This secrecy, however, runs counter to the tradition of open and transparent justice, and causes practical and procedural problems to which there is no satisfactory solution. Added to all of this, is the very real possibility that secret consultations would do nothing to boost public confidence in the justice system. If the public is not aware of the nature and content of the consultations between judge and jury, they would have no way of knowing the extent of the jury's input.<sup>36</sup> Such secrecy would only undermine public confidence rather than enhance it.<sup>37</sup>

## Unfairness to jurors

4.21 The proposal is also widely seen to be unfair to jurors, in both practical and emotional terms. Jurors would either be compelled to participate in the sentencing phase, or choose to be involved. Many were of the view that jurors would not wish to be involved in sentencing.<sup>38</sup> Former jurors and members of the public expressed the view that they were not qualified or interested in participating in sentencing the offender whom they had convicted.<sup>39</sup> The fear was also expressed that requiring jurors to participate in sentencing proceedings may discourage jury service, since prospective jurors may be unwilling to sacrifice even more of their time to devote to the sentencing phase, and result in more people relying on exemptions or seeking to be excused.<sup>40</sup>

4.22 As we noted in IP 27, jurors have already experienced inconvenience during the trial phase in terms of time, lost income, and interruption to work and family life.<sup>41</sup> Requiring additional participation during sentencing would be an increased burden, and likely to place far too much stress on jurors at the end of what may have already been a harrowing experience. Many submissions agree.<sup>42</sup> Indeed, some submission noted the

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- 34. Judge G D Woods, Submission, 28 July 2006.
  - 35. Office of the Director of Public Prosecutions, Submission, 13 September 2006.
  - 36. NSW Bar Association, Submission, 1 September 2006.
  - 37. Office of the Director of Public Prosecutions, Submission, 13 September 2006.
  - 38. Justice R O Blanch, Submission, 31 July 2006; Judge John Goldring, Submission, 16 August 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.
  - 39. See James R Oxley, Submission, 28 July 2006; NM Aldridge, Submission, 27 July 2006; B Blackburn, Submission, 20 August 2006; M Cooper, Submission, received 31 July 2006.
  - 40. Judge G D Woods, Submission, 28 July 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006.
  - 41. Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006.
  - 42. Public Defenders' Office, Submission, 18 September 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Judge John Goldring,

possibility that jury involvement in sentencing might be viewed cynically as an attempt to make jurors scapegoats for unpopular sentencing decisions.<sup>43</sup> They observed, and we agree, that the responsibility for sentencing decisions should continue to rest with judges, and should not be shouldered, even in part, by the jury.<sup>44</sup>

4.23 Further, jurors may not feel comfortable discussing the reason for their verdict with the judge.<sup>45</sup> It is also conceivable that, during the course of those discussions, details of why and how individual jurors reached their decisions would be made known. Compromising the secrecy of jury deliberations, and possibly juror anonymity, would be a serious blow to the criminal justice system.<sup>46</sup> It could also expose jurors to public recrimination should their views be made known, and could have dangerous repercussions, particularly in rural areas where jurors would be more likely to be identified,<sup>47</sup> or in cases where there has been a dissentient juror as a result of a majority verdict.<sup>48</sup>

4.24 We are of the view that the additional burden that jurors would face by being involved in the sentencing phase, would only be justified if significant benefit to the justice system would result from that involvement. For the reasons discussed in this chapter, we do not believe that such benefits would follow.

## PRACTICAL AND PROCEDURAL DIFFICULTIES

4.25 A number of other practical and procedural difficulties detract from the likely success of jury involvement in sentencing. Particular problems are posed by the timing of the consultations between the judge and the jury, the information that should be put to jurors in order for them to be able to contribute effectively, and the cost and delay involved in implementing the proposal.

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Submission, 16 August 2006; and Judge Michael Finnane, Submission, 7 August 2006. The NSW Young Lawyers, Criminal Law Committee noted that the stress for jurors would be particularly acute if offender's family were present in court during the sentencing proceedings.

43. Judge G D Woods, Submission, 28 July 2006; Public Defenders' Office, Submission, 18 September 2006. This view was also expressed by a member of the Homicide Victims Support Group in the 26 July 2006 broadcast of the ABC's *7.30 Report*: see "NSW mulls giving sentencing powers to jurors", transcript accessed at «[www.abc.net.au/7.30/content/2006/s1697930.htm](http://www.abc.net.au/7.30/content/2006/s1697930.htm)».

44. Office of the Director of Public Prosecutions, Submission, 13 September 2006; Judge Michael Finnane, Submission, 7 August 2006; Judge John Goldring, Submission, 16 August 2006.

45. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

46. The Hon Gordon J Samuels, Submission, 13 August 2006; Law Society of NSW, Submission, 8 September 2006.

47. NSW Bar Association, Submission, 1 September 2006.

48. Office of the Director of Public Prosecutions, Submission, 13 September 2006.

## Timing of consultations

4.26 If judges were to consult with jurors on sentencing matters following a guilty finding, those discussions would need to occur either immediately before the jury is discharged, or wait until the court reconvenes for the sentencing hearing. That hearing usually takes place at least six weeks after the completion of the trial to allow time for the necessary reports and submissions relevant to sentencing to be prepared.

### *Immediately following the verdict*

4.27 As we noted in IP 27, the advantage of holding the discussions immediately following the verdict is that inconvenience to jurors would be minimised as there would be no need to reconvene the panel at a later date. It would also ensure the availability of all jurors, giving the judge access to the full range of opinion. However, the jury's input at that stage would be limited to the views and impressions gained during the trial. Much of the information relevant to sentencing is not available until weeks after the verdict. That information includes key psychological profiles, probation and parole reports, Victim Impact Statements, and evidence of treatment programs, etc.<sup>49</sup> This would mean that the jury's opinion would be less informed, and therefore, of lesser value, and would also have procedural fairness implications.<sup>50</sup>

4.28 Further, if counsel wished to present submissions on sentencing to the jury, which might have relevance in informing their views, these would have to be prepared prior to the verdict. This would involve extra cost, which would be an unnecessary expense in the event of a verdict of not guilty.<sup>51</sup> In any event, any such submissions would not be assisted by the kind of post conviction enquiries into subjective circumstances that are essential to the sentencing exercise.

### *Waiting until the sentencing hearing*

4.29 If the consultation between the judge and the jury was delayed until the sentencing hearing, the jury would have access to all reports and submissions relevant to sentencing that were not presented during the trial phase. This would alleviate to some extent the problems raised above. However, the need to bring the jury panel back after a delay of weeks or months raises significant practical difficulties.<sup>52</sup> The problem would be particularly acute in rural areas, since the judge would need to return to the trial venue.<sup>53</sup>

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49. The NSW Young Lawyers, Criminal Law Committee noted that obtaining the jury's views immediately following the verdict deprives the accused of the opportunity to participate in treatment programs between verdict and sentence, which may affect his or her prospects of rehabilitation.

50. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Judge John Goldring, Submission, 16 August 2006; Judge Michael Finnane, Submission, 7 August 2006.

51. Office of the Director of Public Prosecutions, Submission, 13 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

52. NSW Bar Association, Submission, 1 September 2006; Justice R O Blanch, Submission, 31 July 2006; Judge John Goldring, Submission, 16 August 2006; Public Defenders' Office, Submission, 18 September 2006

53. The Law Society of NSW and Legal Aid NSW, noted that the practice followed by some District Court circuit judges of adjourning the sentencing proceedings to

Apart from the inconvenience this would cause to jurors, work or family commitments, ill health, or overseas or interstate travel may make it difficult or impossible for all 12 members of the jury panel to reconvene for the sentencing hearing. If all jurors could not reassemble, and only a “self-selecting” portion of the original 12 returned for the sentence hearing, the representative nature of the jury would be lost.<sup>54</sup>

4.30 From a logistical viewpoint, it is difficult enough scheduling sentencing hearings around the availability of the judge and counsel for both sides. Having also to coordinate the availability of 12 jury members would be exceedingly difficult.<sup>55</sup> Additional expenses would also be incurred in regional areas with judges and jury having to return to circuit courts.<sup>56</sup>

4.31 It would also be difficult to prevent jurors discussing the matter with friends and family, or being influenced by media reporting, in the intervening period between verdict and sentence.<sup>57</sup> The time delay could also lead some jurors to forget their reasons for the verdict, which would undercut the effectiveness of their participation.<sup>58</sup>

## Jurors’ information needs

4.32 The issue of jurors’ information needs with regard to sentencing is tied to the timing of the consultations that would occur between the judge and the jury. If the discussions were to occur immediately following the verdict, then only limited information on matters directly affecting sentencing in relation to the offender’s subjective circumstances would be available to the jury. More information of that kind would be available if the consultations with the jury were to coincide with the sentencing hearing. However, the question remains as to how much legal information a jury would need to be exposed to in order to be properly informed and have a relevant context in which to assess the gravity of the particular offence.

4.33 For example, the NSW Young Lawyers submission asks whether a jury should have access to counsel’s written submissions.<sup>59</sup> If questions are put to the jury, who

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Sydney following a regional trial would need to be discontinued in the event of a jury trial with a guilty verdict. Alternatively, the judge would need to return to the regional area for sentencing, involving greater cost and delay: see Law Society of NSW, Submission, 8 September 2006; and Legal Aid, NSW, September 2006.

54. Judge John Goldring, Submission, 16 August 2006; Justice R O Blanch, Submission, 31 July 2006; Judge Michael Finnane, Submission, 7 August 2006; NSW Bar Association, Submission, 1 September 2006; Public Defenders’ Office, Submission, 18 September 2006

55. Judge Michael Finnane, Submission, 7 August 2006; Public Defenders’ Office, Submission, 18 September 2006.

56. Office of the Director of Public Prosecutions, Submission, 13 September 2006.

57. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; NSW Bar Association, Submission, 1 September 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders’ Office, Submission, 18 September 2006.

58. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

59. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

should formulate them?<sup>60</sup> If a juror seeks clarification on a question, how should this be dealt with?<sup>61</sup> To what extent should the judge give directions on sentencing principles and trends? There is no straightforward answer to these questions. On the one hand, the consultation would most likely be of little value unless the jury had access to all of the relevant material. However, that material is often complex and may be prejudicial. Without the proper training and experience, jurors would be at a loss as to how to interpret it, and as to the appropriate weight to give to each factor.

4.34 The information put to the jury would need to be detailed enough to enable their contribution to be meaningful, yet accessible enough to be easily understood. This would involve training for judges on how to convey sentencing principles and concepts in plain English to untrained people and to obtain their feedback. The Office of the Director of Public Prosecutions considers that the conduct of the consultations with the jury on sentencing would need to be carefully planned to ensure that the consultation process itself does not become an issue of contention.<sup>62</sup>

4.35 We are of the view that the difficulty in determining what information should be made available, and in what format, highlights one of the major complexities associated with the proposal. Preparing and providing the information in the right format would also have significant resource implications.

## Cost and delay

4.36 The cost and delay involved in implementing the proposal are also significant disadvantages.<sup>63</sup> Extra court time would be taken up with the discussions with the jury, resulting in additional legal fees. It is often the practice of the Office of the Director of Public Prosecutions and Legal Aid to use more junior lawyers for sentencing hearings in the District Court in order to free up senior lawyers and Crown Prosecutors for other trials. Should juries be involved at the sentencing stage, however, the senior lawyers would need to be available, incurring extra cost. This would also remove an avenue for younger lawyers to refine their advocacy skills.<sup>64</sup>

4.37 There would also be flow on delays in other cases. The lack of transparency in the discussions between judge and jury could lead to a greater number of appeals on sentence decisions.<sup>65</sup> Should the discussions uncover flaws in the jury's verdict, additional cost and delay would occur in rectifying the error.

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60. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

61. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

62. Office of the Director of Public Prosecutions, Submission, 13 September 2006.

63. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Judge G D Woods, Submission, 28 July 2006; Judge John Goldring, Submission, 16 August 2006; Judge Michael Finnane, Submission, 7 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006

64. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

65. Law Society of NSW, Submission, 8 September 2006; Legal Aid, NSW, Submission, September 2006.

## THE COMMISSION'S CONCLUSION

4.38 In his speech, the Chief Justice articulated a number of benefits that could possibly flow from the introduction of a mechanism whereby judges consult with jurors on the question of appropriate penalties. Those benefits are:

- enhanced jury reasoning and decision-making processes;
- improvements in judicial sentencing brought about through greater exposure to community views; and
- a resulting boost to public confidence in the criminal justice system.

4.39 For the reasons stated in this chapter, the Commission does not believe that such benefits would result from consultation with jurors on matters of sentencing. Any potential benefits are mostly perceived rather than real. The proposal could result in increased levels of public knowledge about the sentencing process, at least for those who served as jurors and became exposed to the consultation process. However, there are better ways to achieve this.<sup>66</sup>

4.40 It is difficult to conceive of any form of jury involvement in sentencing having advantages significant enough to outweigh the serious incursions into the integrity of the criminal justice system that would inevitably result. Even if consultations between judge and jury were restricted to clarifying the factual basis on which the jury's guilty verdict was founded,<sup>67</sup> there is the danger that the secrecy of the jury's deliberation process would be undermined. This may make jurors less inclined to express their views freely while deliberating on the verdict. There would be serious implications for fair trial procedure should jury deliberations be held up to judicial and public scrutiny. At the very least it may confuse or distract jurors from their essential and significant role as finders of fact during the course of the trial.<sup>68</sup>

4.41 Submissions received from current and former members of the judiciary express doubt concerning the efficacy of the proposal. They stress the difficulty of the sentencing process, involving as it does a consideration of complex, and often contradictory, legal principles and evidentiary factors, combined with a need to address the individual circumstances of each case.<sup>69</sup> It is unfair to expect jurors to offer views on matters that

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66. We discuss those ways in Chapter 5.

67. This was suggested by the Chief Justice in his speech as being advantageous in proceedings such as manslaughter, where there are a number of different and alternative bases for the verdict, each carrying different levels of culpability: see also NSW Bar Association, Submission, 1 September 2006 and Justice RO Blanch, Submission, 31 July 2006.

68. The dangers inherent in the practice of asking questions of a jury concerning their verdicts are discussed at length in *Isaacs v The Queen* (1997) 41 NSWLR 374, 379-380.

69. The Hon Gordon J Samuels, Submission, 13 August 2006; Judge John Goldring, Submission, 16 August 2006. See also, Law Society of NSW, Submission, 8 September 2006; and Legal Aid, NSW, Submission, September 2006.

may require specific expertise and training. For example, they would need an understanding of the realities of the rehabilitation prospects and opportunities available to the various classes of offenders who come before the courts. This complexity makes it unlikely that jurors would be able to take into account all relevant matters, which would restrict the level of their involvement to that of a general “chat” with the judge concerning their views on matters such as the gravity of the accused’s conduct.<sup>70</sup> As such the jury’s advice would be of limited value,<sup>71</sup> with one submission suggesting that the judge “might as well listen to talk back radio”.<sup>72</sup>

4.42 Even if jurors were able to grasp all of the relevant issues, they would be likely to have different opinions. We query the benefit to a judge when making a determination on sentencing from receiving 12 different reasons for a guilty verdict, or 12 different views on the severity of the crime or the prospects of the offender being rehabilitated.<sup>73</sup> Nor should it be taken for granted that the views of any one jury are representative of the community as a whole.

4.43 In IP 27, we discussed the studies on public perceptions of leniency in sentencing decisions.<sup>74</sup> Those studies indicate that jurors tend to share the same opinions as judges regarding sentencing when they are informed of all relevant facts. We noted that if this result were to be repeated in practice, there would most likely be little change in sentencing decisions, even with juror involvement. Since the discussions between judge and jury would take place in secret, the public would have no way of knowing the extent of the jury’s involvement, and whether their views were taken into consideration.<sup>75</sup> Consequently, the public perception of leniency would change very little, defeating the purpose of the scheme to involve juries in sentencing.<sup>76</sup>

4.44 In summary, the Commission is of the view that jurors should not be involved in the sentencing process to any greater extent than they are at present. This position is based on the number and strength of the arguments against the proposition, and the lack

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70. Judge G D Woods, Submission, 28 July 2006.

71. NSW Bar Association, Submission, 1 September 2006; The Hon Gordon J Samuels, Submission, 13 August 2006; Judge Michael Finnane, Submission, 7 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006.

72. Judge G D Woods, Submission, 28 July 2006. Another submission referred to such discussions on sentencing matters as a “clayton’s consultation”: Office of the Director of Public Prosecutions, Submission, 13 September 2006.

73. NSW Bar Association, Submission, 1 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Judge Michael Finnane, Submission, 7 August 2006; Public Defenders’ Office, Submission, 18 September 2006

74. IP 27, [3.13]-[3.21].

75. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006.

76. See also NSW Council for Civil Liberties, Submission, 1 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Public Defenders’ Office, Submission, 18 September 2006; Judge John Goldring, Submission, 16 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Law Society of NSW, Submission, 8 September 2006; and Legal Aid, NSW, September 2006.

of any real impetus for change. The practical difficulties of introducing juror participation in sentencing are so overwhelming as to make the suggestion counterproductive. We also believe that in camera consultations between judge and jury on matters of sentencing would inevitably endanger the fairness of criminal proceedings from the perspective of the accused, the jury, the judiciary, and the criminal justice system generally. It is difficult to see how such an outcome could have any positive impact on public confidence.

### Recommendation 1

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The Commission recommends that jurors should not be involved in the sentencing process to any greater extent than they are at present.

## 5. Sentencing and public opinion

- Introduction
- Dealing with public perceptions
- Addressing public confidence

## INTRODUCTION

5.1 In the previous chapter, the Commission recommended that juries should not be involved in the sentencing process to any greater extent than they are currently. A key reason for this recommendation is the belief that juror involvement in sentencing would not achieve the stated aim of boosting public confidence in the criminal justice system. Indeed, the drawbacks of the proposal are such that the opposite result could eventuate.

5.2 However, in rejecting the concept of juries having a greater role in sentencing, we do not dismiss the importance of public confidence in, and perceptions of, the criminal justice system. As noted in one submission, “[w]here justice is not being perceived to be done, there is a serious dysfunction in the system”.<sup>1</sup> This chapter makes recommendations on how the issue of public confidence can be more fully explored and addressed.

## DEALING WITH PUBLIC PERCEPTIONS

5.3 In IP 27, the Commission discussed public perceptions about the criminal justice system, and the difficulty of ascertaining the true nature of those perceptions.<sup>2</sup> A commonly held view in many countries is that violent crime is spiralling out of control, that judges are out of touch with reality, and that sentences are far too lenient for the crimes being committed.<sup>3</sup> Although this perception is not supported by statistics, it nevertheless remains a powerful tool, often acting as a catalyst for reform and influencing the decisions of policy makers.<sup>4</sup> Research has looked at the reasons for this apparent disparity between statistics and perception, finding that:

- People significantly overestimate the incidence of violent crime, and underestimate the severity of current sentencing practices, and therefore think the courts’ response to be inadequate. People are also more likely to support more severe sentences if they feel victimised by the fear of crime.<sup>5</sup> These findings have been duplicated in studies in Australia,<sup>6</sup> New Zealand,<sup>7</sup> and the United Kingdom.<sup>8</sup>

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1. NSW Council for Civil Liberties, Submission, 1 September 2006.

2. See IP 27, [3.9]-[3.21].

3. For a detailed analysis of the complexity of public opinion and its impact on sentencing law and policy in Australia and overseas, see Julian V Roberts, Loretta J Stalans, David Indermaur and Mike Hough, *Penal Populism and Public Opinion – Lessons from Five Countries* (Oxford University Press, New York, 2003).

4. David Indermaur, “Public Perceptions of Sentencing in Perth, Western Australia” (1987) 20 *Australian and New Zealand Journal of Criminology* 163, 163.

5. Mike Hough, Helen Lewis and Nigel Walker, “Factors associated with ‘punitiveness’ in England and Wales” in Nigel Walker and Mike Hough, *Public Attitudes to Sentencing: Surveys from Five Countries* (Gower Publishing Co Ltd, Great Britain, 1988) 210-211.

6. Indermaur (1987) 175-177.

- Survey results more accurately reflect the type of question asked, the context in which it was asked, and the amount of information provided, rather than a definitive indication of public opinion.<sup>9</sup>
- Most people receive the majority of their information about the courts and sentencing through the mass media, whose reporting of such issues is, at best, disproportionate and superficial, and at worst, biased and inaccurate.<sup>10</sup>

5.4 As the Chief Justice pointed out in his speech, the media play a significant role in relaying, shaping and distorting public opinion. Systematic allegations by the media of leniency in sentencing are not only ill-informed, but also chip away at public confidence and skew public perception.<sup>11</sup> The Chief Justice acknowledged that mistakes in sentencing occasionally do occur. Unfortunately, these tend to be the only examples highlighted in the media, giving the impression that those decisions are widespread and typical.

5.5 By their very nature, the news media provide the public with information that is new, or out of the ordinary, and therefore worthy of comment. Since offenders convicted of violent crimes are newsworthy, and since sentencing is the most visible aspect of the trial process, it is not surprising that sentencing decisions are a fertile source for media reports. It is also not surprising that only the most salacious details of a select few cases are ever reported. The cases that are reported also tend to focus on the reaction of the victims or their families, who understandably would have preferred a harsher sentence, and pay little, if any, regard to sentencing principles or trends.

5.6 However, having said that, we do not propose that the answer to any real or perceived lack of public confidence in the sentencing process is to place the blame on the media. Even if, as some submissions suggest, public opinion about sentencing is not at

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7. Judy Paulin, Wendy Searle and Trish Knaggs, *Attitudes to Crime and Punishment: A New Zealand Study* (Ministry of Justice, Wellington, New Zealand, December 2003) accessed at «[www.justice.govt.nz/pubs/reports/2003/publicattitudes](http://www.justice.govt.nz/pubs/reports/2003/publicattitudes)».
  8. Nigel Walker, Mike Hough and Helen Lewis, "Tolerance of Leniency and Severity in England and Wales" in Walker and Hough, 185-186.
  9. See also Indermaur (1987) 163.
  10. Anthony N Doob and Julian V Roberts, "Public punitiveness and public knowledge of the facts: some Canadian surveys" in Walker and Hough, 113-133; Julian V Roberts and Anthony N Doob, "Sentencing and Public Opinion: Taking False Shadows for True Substances" (1999) 27(3) *Osgoode Hall Law Journal* 491, 499-501. See also Indermaur (1987) 164. A study in the United Kingdom revealed that 91% of people surveyed gained most of their information about crime from the print and electronic media. That study also found that readers of the tabloid press were more likely to hold punitive views regarding sentencing than other readers: Mike Hough, Helen Lewis and Nigel Walker, "Factors associated with 'punitiveness' in England and Wales" in Walker and Hough, 212-213.
  11. See Justice James Spigelman, "Sentencing Guideline Judgments" (1999) 73 *Australian Law Journal* 876, 880.

levels as low as those depicted in the tabloid press, perception has a way of becoming reality.<sup>12</sup> We therefore need to find a way of addressing the problem.

#### *Studies on public perceptions of sentencing*

5.7 Studies conducted in Canada have shown that people are much more inclined to consider sentences to be appropriate, and more open to alternatives to imprisonment, when they are made fully aware of the facts of particular cases. Those studies showed that those who read only media accounts were much more inclined to feel that the sentence imposed was too lenient, particularly where the media had been critical of the judge. However, people who had access to court documents relating to the same case, which set out the full facts of both sides, were much more content with the decision of the trial judge. In fact, a number of people felt that the sentence was too harsh.<sup>13</sup> These same results have been found in Australia,<sup>14</sup> most recently by the Victorian Sentencing Advisory Council,<sup>15</sup> and also in the United Kingdom,<sup>16</sup> and the United States.<sup>17</sup>

## ADDRESSING PUBLIC CONFIDENCE

5.8 Based on these studies, it seems that a two-pronged approach is needed to address the issue of public confidence in the criminal justice system, if it is to be addressed at all. The first is the need for more research into the true nature of public sentiment and opinions about sentencing decisions in NSW. The second is the need to recognise that community education about current sentencing practices and procedures is the key to improving public confidence.

### Need for continued research

5.9 The most effective way to address the issue of public confidence in the criminal justice system in NSW is by relying on qualitative local data through which the community sentiment can be gauged, and then to address these concerns by providing relevant information to the public. This work could be done through existing organisations such as

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12. NSW Bar Association, Submission, 1 September 2006; Public Defenders' Office, Submission, 18 September 2006; The Hon Gordon J Samuels, Submission, 13 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006.
  13. Doob and Roberts in Walker and Hough, 124-133; Roberts and Doob, 501.
  14. Indermaur (1987); John Walker, Mark Collins and Paul Wilson, "How the public sees sentencing: an Australian survey" *Trends and Issues in Crime and Criminal Justice* (Australian Institute of Criminology, No 4, April 1987).
  15. Victoria, Sentencing Advisory Council, *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*, Research Paper (July 2006).
  16. Andrew Ashworth and Mike Hough, "Sentencing and the Climate of Opinion" (1996) *Criminal Law Review* 776. See also Michael Zander and Paul Henderson, *The Royal Commission on Criminal Justice: The Crown Court Study*, Research Study No 19 (1993).
  17. See Roberts, Stalans, Indermaur and Hough. See also Michael J Hindelang, *Public Opinion Regarding Crime: Criminal Justice and Related Topics*, US Department of Justice, Law Enforcement Assistance Administration (1975).

the Sentencing Council, the Bureau of Crime Statistics and Research and the Judicial Commission.

5.10 A recent study in Victoria, carried out by the Sentencing Advisory Council, highlighted the need for such information. That study, entitled *Myths and Misconceptions: Public Opinion versus Public Judgment about Sentencing*,<sup>18</sup> examined the nature of public opinion about sentencing, including how that opinion can and should be measured. A significant finding of that study was that there is a substantial gap in knowledge about public opinion on sentencing in Victoria, with more detailed and up to date information needed, based on sound and valid methodologies.<sup>19</sup> The researchers made the following observation:

*There are many, many issues about which we have little or no evidence; while this vacuum exists there is the danger that policy will be created based on the assumption of a punitive public. But as a large body of research now shows, this assumption is at best over-stated and at worst simply wrong.*<sup>20</sup>

5.11 In NSW, we know even less. The Commission strongly agrees that public policy and sentencing legislation should not be founded on untested assumptions as to what the community wants or expects. There is a knowledge gap in terms of what people actually know about sentencing, and what policy makers know about informed public opinion. For example, we need to know details regarding the views that people hold on the types of sentences that may be appropriate for different offence types, what they think about non-custodial sentences, whether there are other sentencing options that should be considered, how first time offenders should be treated, etc. We consider that, until this knowledge gap is bridged by further qualitative study, initiatives aimed at addressing negative public perceptions of sentencing, such as the one under consideration, should not be implemented.

## Community education strategies

5.12 The Commission considers that educating the public on how sentences are currently determined could help to bridge the gap in the public consciousness between loosely held perception and informed judgment. Several submissions expressed the view that there is a need to address the public's lack of knowledge about sentencing trends and issues, the circumstances of highly contentious cases, and the factors that judges must consider when determining a sentence, since this is likely to improve public confidence.<sup>21</sup>

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18. Victoria, Sentencing Advisory Council, Research Paper.

19. Victoria, Sentencing Advisory Council, Research Paper, 39.

20. Victoria, Sentencing Advisory Council, Research Paper, 40.

21. NSW Young Lawyers, Criminal Law Committee, Submission, 8 September 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; The Hon Gordon J Samuels, Submission, 13 August 2006.

Greater public education regarding the complexity of sentencing makes it more likely that, even without jury involvement, public confidence in sentencing will be retained.<sup>22</sup>

5.13 It was also noted in submissions that the means of disseminating information to the public have never before been easier or more affordable, for example, via the internet and audio visual tools.<sup>23</sup> Some of the avenues through which the public may be informed include:

- the expanded functions of the Sentencing Council of NSW;
- the release by the courts of summaries of sentencing judgments in more easily understood form;
- the production of more plain English publications explaining how sentencing works;
- public forums, coinciding with events such as Law Week; and
- cooperation between the media and criminal justice officials in disseminating more accurate and balanced information about sentencing.

## Role of the Sentencing Council

5.14 As discussed in Chapter 2, the Sentencing Council of NSW was established in 2003 to provide independent advice to the Government on sentencing policy and practice.<sup>24</sup> In November 2005, the NSW Sentencing Council submitted a report to the former Attorney General, the Hon Bob Debus MLC, outlining the Council's views on its statutory powers under Part 8B of the *Crimes (Sentencing Procedure) Act 1999* (NSW). That report recommended that the Sentencing Council's statutory functions should be broadened to include:

- advising the Attorney General on sentencing matters generally and of its own motion;
- conducting research and disseminating information to interested persons;
- gauging public opinion on sentencing matters; and
- fulfilling an educative role within the community.<sup>25</sup>

This would bring the functions of the NSW Sentencing Council more into line with those exercised by the Victorian Sentencing Advisory Council.<sup>26</sup>

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22. NSW Bar Association, Submission, 1 September 2006; Judge John Goldring, Submission, 16 August 2006; Office of the Director of Public Prosecutions, Submission, 13 September 2006; Public Defenders' Office, Submission, 18 September 2006; Andrew Vincent, La Trobe University, Submission, 6 September 2006; Law Society of NSW, Submission, 8 September 2006.

23. NSW Council for Civil Liberties, Submission, 1 September 2006.

24. See [2.37]-[2.38] of this Report.

25. See NSW Sentencing Council, *Report on Sentencing Trends and Practices 2005-2006*, 10.

26. See *Sentencing Act 1991* (Vic) s 108C(1).

5.15 In late 2006, legislative amendments were made to expand the Sentencing Council's membership and functions.<sup>27</sup> The Council's membership has increased by three in order to make it more representative,<sup>28</sup> and provision has been made specifically for the Council to educate the public about sentencing matters.<sup>29</sup>

5.16 A number of submissions suggest that the NSW Sentencing Council could mirror the work of the Victorian Sentencing Advisory Council in using public consultation, polling, community outreach and education programs to raise public awareness about sentencing, and accordingly, lift public confidence in the current sentencing processes.<sup>30</sup> One such community education program currently being run by the Victorian Sentencing Advisory Council is a sentencing seminar called "You be the Judge". The Council's website advises that this seminar provides information to the Victorian public on sentencing options and principles, and involves the audience in a mock sentencing exercise. This seminar has also been adapted into the Legal Studies curriculum in Victorian High Schools.<sup>31</sup>

5.17 The Commission is of the view that the Sentencing Council should have a pivotal role in investigating and in improving community understanding of sentencing matters in NSW. The recent expansion of the Sentencing Council's powers is a positive step towards achieving this goal. Those powers would be enhanced if the Sentencing Council were able to publish monographs and guides to sentencing of its own motion, as well as the results of its researches. We note in this regard that the State Government has given support for the Sentencing Council to undertake research into community views on sentencing to ensure that they are better reflected in sentencing law and practice.<sup>32</sup>

## Clearly articulated reasons for sentencing

5.18 We believe that one of the most effective ways for improving community understanding of sentencing would be to encourage judges to provide more clearly articulated reasons for the sentences they hand down. It is essential, and will continue to be essential, for judges in this country to provide reasons for the sentences they hand down. To fail to do so would be to guarantee a successful appeal.

5.19 The Office of the DPP considered that judges or court staff should release plain English explanations of sentencing decisions.<sup>33</sup> Providing clear and easily digestible

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27. See *Crimes and Courts Legislation Act 2006* (NSW), which inserted s 100I(f)-(h) and s 100J(1)(e) in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

28. In addition to the ten existing members, the Sentencing Council is now to be constituted by a further three members: one with expertise or experience in corrective services, one with expertise or experience in juvenile justice, and a representative of the Attorney General's Department: see *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100I(f)-(h).

29. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 100J(1)(e).

30. NSW Bar Association, Submission, 1 September 2006; Andrew Vincent, La Trobe University, Submission, 6 September 2006.

31. See «[www.sentencingcouncil.vic.gov.au](http://www.sentencingcouncil.vic.gov.au)».

32. This formed part of the Government's election policy in the lead up to the 2007 State election.

33. Office of the Director of Public Prosecutions, Submission, 13 September 2006.

rationales for sentencing will assist in achieving the twin aims of boosting public education and confidence regarding aspects of sentencing, since it would shed light on the reasons for any apparent leniency.

5.20 A handful of summary sentencing judgments have been issued by the NSW Supreme Court in recent years, mainly in relation to more high profile or contentious cases.<sup>34</sup> However, it is not general practice. The Commission is of the view that the more widespread release of sentencing summaries, both at the time of the initial sentence and on appeal, would be of assistance in providing the community with information about how and why judges make sentencing determinations. We recognise that this initiative would have time and resource implications for the courts, and accept that it would not be necessary for a large proportion of run of the mill prosecutions where the issues are simple and the sentence uncontroversial. The position is otherwise for the more complex cases and for those that are likely to attract the interest of the public. In this respect, the appellate courts are well placed to explain the sentencing principles that underlie particular decisions.

## Plain English publications

5.21 The research report completed by the Victorian Sentencing Advisory Council noted that people were of view that information about sentencing was either unavailable or difficult to find.<sup>35</sup> This finding points to a need for more information about sentencing practices, presented in an easily accessible form.

5.22 A number of initiatives have already been undertaken. For example, the Judicial Conference of Australia has published a booklet entitled *Judge for Yourself*, which offers a guide to sentencing in Australia.<sup>36</sup> Having a national focus, the publication provides information on the court system, the public perceptions of crime, the laws that underpin sentencing decisions, the purposes of sentencing and the factors that must be taken into account. The booklet also contains examples of sentencing decisions.

5.23 In NSW, the recently released Sentencing Information Package contains similar information.<sup>37</sup> Its focus is to assist victims of crime in understanding the sentencing process. The pamphlet sets out the procedure followed at sentencing hearings, the

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34. For example, summaries were released following the sentencing of Ray Williams and Rodney Adler for their roles in the collapse of HIH Insurance Ltd.

35. Victoria, Sentencing Advisory Council, Research Paper at 37.

36. The booklet is a collaborative effort made possible by grants from the Victorian Law Foundation, the Victorian Sentencing Advisory Council, the Law Foundation of South Australia and the Law Society Public Purposes Trust of South Australia. The project also received input from judicial officers of the Federal Court of Australia, the Supreme Courts of NSW, South Australia and Victoria, NSW Local Courts and the Judicial Commission of NSW. It can be printed or downloaded at «[www.jca.asn.au/content/attachments/Final\\_JCA\\_booklet1.pdf](http://www.jca.asn.au/content/attachments/Final_JCA_booklet1.pdf)».

37. The Sentencing Information Package is jointly produced by the Criminal Law Review Division and the Victims of Crime Bureau, with input from the NSW Sentencing Council. See «[www.lawlink.nsw.gov.au/lawlink/clrd/ll\\_clrd.nsf/pages/CLRD\\_sentencing\\_info](http://www.lawlink.nsw.gov.au/lawlink/clrd/ll_clrd.nsf/pages/CLRD_sentencing_info)».

aggravating and mitigating factors that a judge must take into account, the sentencing options that are available, and the process for appealing against a sentencing decision.

5.24 We are of the view that more publications of this nature are required. A general publication could be produced aimed at the community as a whole, as well as other information more specifically targeted to interest groups, including Legal Studies students. The information should be available in various formats, including hard copy, online, CD-Rom and audio visual. While a number of agencies could collaborate in producing sentencing information, it falls most logically within the functions of the Sentencing Council. Once again, we recognise that this initiative would have resource implications, and may require the grant of additional power to the Council, whose functions are determined by legislation.<sup>38</sup>

## Working with the media

5.25 Much of the current public perception is fed through the media, whose coverage can be incomplete and misleading.<sup>39</sup> More balanced and responsible media reporting would assist public confidence.<sup>40</sup> This could be encouraged and facilitated by the implementation of the other measures aimed at boosting community education recommended in this chapter.

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38. See para [5.14]-[5.15] for a discussion of the functions of the Sentencing Council.

39. NSW Council for Civil Liberties, Submission, 1 September 2006; Judge John Goldring, Submission, 16 August 2006.

40. Judge John Goldring, Submission, 16 August 2006.

## Recommendation 2

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The Commission recommends that further empirical studies should be done in NSW on public perceptions of the sentencing process.

## Recommendation 3

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The Commission recommends that the issue of public confidence in sentencing decisions should be addressed by increasing public education about sentencing laws and practice, including the factors and options that a judge must consider when determining the type and length of a sentence. Public education could be facilitated through:

- campaigns developed under the newly expanded functions of the Sentencing Council;
- greater use by the courts of plain English summaries of the reasons for sentencing decisions;
- the production and widespread distribution of easy to understand information concerning sentencing available in various formats; and
- improved cooperation between the media and criminal justice officials responsible for disseminating public information about sentencing matters.

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# Appendix

- List of submissions

## List of submissions

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Mr Aldridge (27 July 2006)

Australian Labor Party, Kincumber Region Branch (20 August 2006)

Ben Blackburn (30 August 2006)

The Hon Justice RO Blanch (31 July 2006)

Marge Cooper (received 31 July 2006)

Carol O'Donnell (28 July 2006)

Director of Public Prosecutions for NSW (13 September 2006)

L Faure (31 July 2006)

His Honour Judge Michael Finnane (7 August 2006)

His Honour Judge John Goldring (16 August 2006)

Law Society of New South Wales (8 September 2006)

Legal Aid, New South Wales (September 2006)

Dr Austin Lovegrove, University of Melbourne (2 August 2006)

James R Oxley (26 July 2006)

The Hon Gordon Samuels AC QC

His Honour Judge M Sides (28 July 2006)

His Honour Judge G D Woods (28 July 2006)

NSW Bar Association (22 August 2006)

NSW Council for Civil Liberties (1 September 2006)

NSW Young Lawyers, Criminal Law Committee (8 September 2006)

Public Defenders (19 September 2006)

Andrew Vincent, Victoria University and La Trobe University (6 September 2006)

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